IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-663

CENTENO SUPER MARKETS, INC.,
Petitioner,

VERSUS

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above action enforcing an order of the National Labor Relations Board.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, with Judge Gee dissenting as to points presented by this Petition, is reported at 555 F.2d 442 and is attached hereto as Appendix A at page A-1. 1/ The judgment of the Court of Appeals is attached as Appendix B at page A-15, and the order denying the Petition for Rehearing and Rehearing En Banc is attached as Appendix C at page A-17. The decision and order of the National Labor Relations Board and the decision of Administrative Law Judge Marion C. Ladwig are reported at 220 NLRB 1151 and are attached hereto as Appendices D and E at pages A-19 and A-25.

By order entered October 11, 1977, the time for issuance of the mandate was stayed to and including November 10, 1977, pending application for certiorari.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 27, 1977, and a timely Petition for Rehearing with suggestion for Rehearing En Banc was denied on September 26, 1977. The jurisdiction of this Court is invoked under 29 U.S.C. § 160(e) (1970) and 28 U.S.C. § 1254(1) (1970).

1/ Page references to the appendices attached to this Petition are indicated by the symbol "A" followed by the page number. The symbol "Tr" is in reference to the transcript of the testimony before the Administrative Law Judge, and "RX" refers to the Company's exhibits below.

QUESTION PRESENTED FOR REVIEW

In enforcing the National Labor Relations Board's order that Dolores Mireles and Anita Gonzalez be reinstated with back pay, did the Court of Appeals misapprehend or grossly misapply the standard of review mandated by this Court in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1950)?

STATUTES INVOLVED

This case involves the following sections of the National Labor Relations Act, *as amended*, which are set out verbatim in Appendix F at page A-80:

> Sections 8(a)(1) and 8(a)(3), 49 Stat. 452 (1935), *as amended*, 65 Stat. 601 (1951), *as amended*, 73 Stat. 519 (1959) (29 U.S.C. §§ 158(a)(1) & (3) (1970)).
>
> Section 10(e), 49 Stat. 454 (1935), *as amended*, 61 Stat. 140 (1947), *as amended*, 72 Stat. 941 (1958) (29 U.S.C. § 160(e) (1970)).

STATEMENT OF THE CASE

This case began, for purposes of this Petition, on August 5, 1974, when Retail Clerks Local 455 ("Union") filed charges with the National Labor Relations Board ("Board" or "NLRB") alleging that Dolores Mireles, Anita Gonzalez and another employee (whose discharge was unrelated to those of Mireles and Gonzalez) had been discharged by Centeno Super Markets, Inc. ("Company" or "Petitioner") because of union activities. The history of two other charges, filed subsequently and then

consolidated, is not pertinent to this Petition, which is limited in scope to the Mireles and Gonzalez matters.

On October 1, 1974, the Board's Regional Director issued a complaint claiming, *inter alia*, that Mireles and Gonzalez had been discriminatorily discharged in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act (29 U.S.C. § § 158(a)(1) & (3) (1970)). A hearing was thereafter held before Administrative Law Judge ("ALJ") Marion C. Ladwig, and on June 26, 1975, he issued a written decision finding that the Mireles and Gonzalez discharges were unlawful and ordering their reinstatement with back pay.

By virtue of the totally opposing polarity in the testimony of the respective witnesses for the Petitioner on the one hand, and for the Board's General Counsel on the other, the ALJ's decision necessarily hinged on his credibility choices. Although in his analysis of the Mireles and Gonzalez discharges, the ALJ uniformly credited the General Counsel's witnesses and discredited those called by the Company, it is not the one-sidedness of those findings which Petitioner is constrained to challenge. It is rather the totally convoluted reasoning forming the basis of the ALJ's credibility choices, their rubber-stamp treatment by the Board, and most importantly, the failure of the United States Court of Appeals for the Fifth Circuit to disturb the holdings below – an abdication of the review responsibilities mandated in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1950), which was vigorously opposed by one dissenting member of the panel.

Dolores Mireles was the only General Counsel witness called to dispute the Company's proof that she was fired for misconduct after numerous warnings, and unless she is credited, there is no evidenciary basis for the finding that she was illegally discharged. During the hearing, she attempted to conceal the

fact that she had received a disciplinary warning six weeks before her discharge (Tr 158, 222). Then, after being confronted with a sworn affidavit she had given to the General Counsel and the transcript of her hearing before the Texas Employment Commission during which she admitted being warned, Ms. Mireles flatly confessed that she had perjured herself in the affidavit (Tr 235). In the face of this classic example of witness impeachment, the ALJ unbelievably concluded that Ms. Mireles' admission of perjury rendered her an "honest, forthright witness, willing to admit any of her shortcomings" (A-34). The ALJ thus viewed her admission of perjury as being commendable and fortifying her truthfulness, thereby crediting her not *in spite of* the destruction of her veracity, but *because* of it! 2/ Judge Gee, in dissenting from the Fifth Circuit's per curiam enforcement order, shared in Petitioner's incredulity:

> I am wholly unable to conclude that the ALJ properly exercised his power to resolve credibility questions when he rehabilitated Ms. Mireles as a witness by pointing to an admitted incident of lying under oath. . . . The finding that Ms. Mireles was unlawfully discharged for specious reasons rested on the finding that her testimony was believable. The record displays a pattern of evasions and several belated admissions that prior statement[s] of hers were less than accurate. Because I consider that the ALJ in crediting a witness on the basis of her admission of prior perjury "expressed a theory of credibility that was . . . far foreign to that which he should

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2/ Interestingly, in *Plastic Sealers, Inc.*, 200 NLRB 22, 27 (1972), the same ALJ suggested that a company manager be referred to the Department of Justice because he had given allegedly false testimony.

> have applied," *NLRB v. Florida Citrus Canners Cooperative*, 311 F.2d 541, 543 (5th Cir. 1963), I would deny enforcement of the order to reinstate Ms. Mireles with back pay. [A-11]

Had the ALJ not inexplicably credited Ms. Mireles' testimony, which was the *only* evidence disputing the Company's proof that she was fired for cause, an unlawful discharge finding would have been precluded.

The case of Anita Gonzalez was dealt with by the ALJ in an equally appalling fashion. He ordered her reinstatement on the strength of her own testimony 3/, even though it was internally contradictory and was disputed by seven witnesses who were summarily discredited, including the inherently more reliable testimony offered by two store customers (the Trevinos) and co-worker Enriqueta Vasquez. The patently

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3/ The ALJ also credited the hearsay affidavit of union business agent Juan Sierra as corroborating a portion of Gonzalez' testimony not directly related to her discharge (A-49). Sierra was the General Counsel's principal witness, having testified five times during the hearing. The ALJ's decision does not mention Sierra's testimony, even though he was unquestionably untruthful: *e.g.*, he claimed he first met Company President Centeno a few days after Gonzalez was discharged (on July 26) (Tr 112-13); then after the hearing was recessed for three weeks he testified that he met with Centeno on nine separate occasions and that every meeting occurred *before* July 22, 1974 (Tr 1123-24). Sierra's affidavit was introduced by the Company for impeachment purposes and is in irreconcilable conflict with Sierra's testimony on material points (compare RX-2, p. 1 with Tr 49, 71, 123 and 141). Inexplicably, the ALJ did not mention Sierra's prevarications during the hearing or the contradictions between his testimony and his affidavit, thereby providing yet another example of his clearly erroneous methodology of resolving witness credibility. *See Altemose Construction Co. v. NLRB*, 514 F.2d 8, 14 (3d Cir. 1975) (inconsistencies between witness's testimony at hearing and his sworn affidavit should have been explicitly considered by ALJ in deciding witness credibility).

irrational methodology of the ALJ in making credibility findings regarding Gonzalez was again critiqued and rejected by Judge Gee in his dissent:

> The ALJ's explanation of why he chose to believe Ms. Gonzalez' version of the firing and disbelieve the Trevinos and Centeno illustrates his selective highlighting of supportive sections of some mixed-bag testimony while conveniently ignoring the almost inseparable, less supportive parts and his undue emphasis on factors which provide only flimsy support for his choice. . . . In short, the ALJ appears to have shored up a questionable choice in favor of Gonzalez' testimony by editing testimony of some witnesses and by using factors which as strongly support the conflicting testimony of the Trevinos and president Centeno as the testimony of Gonzalez. [A-12, 13]

The Board summarily affirmed the ALJ's decision on October 8, 1975, and thereafter petitioned the United States Court of Appeals for the Fifth Circuit to enforce its order. On July 5, 1977, the Fifth Circuit ordered enforcement in a per curiam opinion which failed to elucidate its rationale except in the most general terms, but which, as noted below, relied upon an obsolete Supreme Court decision in support of its ruling.

REASONS FOR GRANTING THE WRIT

THE FIFTH CIRCUIT MISAPPREHENDED OR MISAPPLIED THE CORRECT STANDARD OF JUDICIAL REVIEW

A. The Proper Standard of Review – the Teachings of *Universal Camera*

Review of NLRB orders has been placed by 29 U.S.C. § 160(e) (1970), as amended, in the hands of the United States Courts of Appeals, with the admonition that "the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." Shortly after passage of this legislation, this Court set the parameters of its review of the Circuit Courts' exercise of their appellate responsibilities:

> Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied. [*Universal Camera, supra* at 490-91]

This test for Supreme Court intervention was subsequently reaffirmed in *NLRB v. Walton Manufacturing Co.*, 369 U.S. 404, 408 (1962).

This Court's construction of 29 U.S.C. § 160(e) in *Universal*

Camera resulted from the need to clarify the change in the judicial review standard adopted by Congress in 1947. The final wording, as amended, requiring "substantial evidence *on the record considered as a whole*", was not selected by mere fortuity. On the contrary, the italicized verbiage was specifically chosen to counter the prevalent notion that as long as there was sufficient evidence *supporting* the Board's findings, they must be accepted even where the overwhelming preponderance of the evidence ran counter to the Board's findings of fact, which on occasion strained the reviewing court's credulity (*Universal Camera, supra* at 485-86 & n. 22). As recognized by this Court in *Universal Camera* (*ibid.*), the very abuse at which the 1947 amendment was aimed was the impotency of the Courts of Appeals to perform meaningful review where there was *any* evidence found buttressing the Board, an impotency which found its archetype in *NLRB v. Nevada Consolidated Copper Corp.*, 316 U.S. 105 (1942).

In *Nevada Consolidated Copper*, this Court reversed a Tenth Circuit refusal to enforce a Board order, because it could not say that the findings of fact of the Board were "without support in the evidence," and "if the findings of the Board are supported by evidence the courts are not free to set them aside. . . ." *Id.* at 107. Significantly, the Court relied for the quoted, obsolete stricture upon its earlier decision in *NLRB v. Link-Belt Co.*, 311 U.S. 584 (1941). In the case at bar, the Fifth Circuit, in holding that the ALJ's findings are "supported by substantial evidence, and is [*sic*] therefore conclusive", likewise cited the *Link-Belt* case (A-4). This is curious, since the standard of judicial review and indeed the entire efficacy of the substantial evidence rule and its relationship to the powers of the Courts of Appeals was radically changed, subsequent to *Link-Belt*, by the 1947 amendment and this Court's interpretation in *Universal Camera* which recognized that *Nevada Copper* and its ilk are now obsolete. *Universal Camera*,

supra at 485-87.4/

The change wrought by Congress and explained in *Universal Camera* is decisive in the instant case. In contrast to the one-sided search for sufficient evidence to permit adoption of the Board's view, as prevalent in *Link-Belt* and *Nevada Consolidated Copper*, such a position is clearly untenable since *Universal Camera:*

> Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record. [*Universal Camera, supra* at 487-88]

This Court unmistakably mandated that in viewing the record in its entirety to reach a conclusion as to the reasonableness of the Board's findings, the Courts of Appeals must delve into the propriety of the weight accorded witness's testimony, as an element of its thoroughgoing review:

4/ Congress' specific dissatisfaction with *Link-Belt* is evident from HR Rep. No. 245, 80th Cong. 1st Sess. 41-42 (1947), reprinted in Legislative History of the Labor-Management Relations Act 1947, at pp. 332-33 (1974). The excerpt from HR Rep. No. 245 in which *Link-Belt* was cited is reproduced as Appendix G to this Petition at page A-84.

> . . . [C]ourts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when reviewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. *The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses* or its informed judgment on matters within its special competence or both. [*Id.* at 490 (emphasis added).]

The Court went on to opine that the examiner's ability to observe demeanor should be given consideration, but that his opinion should be considered along with the consistency and inherent probability of the testimony, holding:

> We do not require that the examiner's findings be given more weight than in reason and in the light of judicial experience they deserve. [*Id.* at 496.]

This Court made it clear beyond peradventure that in order for meaningful judicial review of the Board's findings to take place, the Courts of Appeals must include the ALJ's credibility findings in their scrutiny, and must reject those findings where the record as a whole gainsays their validity.

B. Application of the Standard of Review in the Instant Case

A meaningful review of the record herein compels the conclusion that the ALJ's credibility choices in the Mireles and Gonzalez cases were at best illogical, and at worst totally irresponsible, and further that the reinstatement orders based *entirely* on those findings were unjustified and should have been denied enforcement. The Court of Appeals, in perfunctorily stamping the ALJ's credibility findings "legitimate" and holding his findings to be supported by substantial evidence and therefore conclusive under *Link-Belt*, demonstrates such a misapprehension of the correct standard of judicial review or gross misapplication of the correct standard that undeniably constitutes this case "the rare instance" in which, under *Universal Camera*, this Court must intervene. The dissenting member of the Fifth Circuit panel recognized the uniqueness of this case:

> My concern focuses upon what appears from the record and the decision of the Administrative Law Judge (ALJ) – affirmed by the Board in all respect – to have been an almost uniform discrediting of company witnesses and crediting of Board witnesses, in some circumstances when even the cold record militates for the opposite result. The ALJ's access to demeanor evidence normally places his credibility choices out of the reach of the reviewing court, but preservation of the utility and fairness of the administrative hearing requires that we decline to follow him on the rare occasion when he lists too far to either side. This appears to me to be that rare case . . . . [A-5]

But when his choices veer toward incredibility, we must cease to defer to them as sheltered credibility choices. Only by calling attention to his departures

> and refusing to enforce the Board's order to the extent it is based on such departures can we ensure that the administrative hearing fairly and efficiently serves its intended function. [A-14]

The action of the majority below virtually does away with any judicial review of credibility choices and signals a return to the dark era of *Link-Belt* and *Nevada Consolidated Copper* preceding the beacon-light of *Universal Camera*. It is difficult to conceive a more flagrant departure from rational credibility analysis, or a theory of credibility more convoluted or more inconsistent with "a fair estimate of the worth of the testimony", than that expressed by ALJ Ladwig in crediting interested charging party Mireles on the basis of her confession of perjury. 5/ If such a rationale can withstand the light of judicial scrutiny, then the principles espoused by this Court some 27 years ago have been stripped of their efficacy. Of almost equal flagrance are the fault-fraught credibility rationalizations forming the sole foundation for the ALJ's findings in the Gonzalez case, which, as shown by Judge Gee's dissent (A-11 through 14), are so contrary to sound reason that they must collapse under the weight of meaningful judicial review, as must the ALJ's decision and those endorsing it. The decision of the Court of Appeals herein in summarily deferring to such

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5/ This Court's abhorrence of perjured testimony and recognition that incidents of false swearing are destructive of witness credibility are evident in *Communist Party of the United States v. Subversive Activities Control Board*, 351 U.S. 115, 124-25 (1955) (If witnesses "committed perjury in testifying in other cases on subject matter substantially like that of their testimony in the present proceedings, their testimony in this proceeding is inevitably discredited and the Board's determination must duly take this fact into account."), and *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1948) ("[T]he testimony of one who has been found unreliable as to one issue may properly be accorded little weight as to the next.").

unreasonable credibility findings is not only contrary to the standard of judicial review long ago set out in *Universal Camera*, but stands as a preclusion to any meaningful review of Board action wherein the focus of the opposition to enforcement of the Board's order is grounded in the clearly erroneous credibility theories and choices of the ALJ.

The instant case provides this Court with an opportunity not only to correct one Circuit Court's departure from the correct standard of judicial review, which, unless corrected, can be expected to resurface again and again in the many NLRB cases handled by the Fifth Circuit, but also to clarify for all Courts of Appeals a point upon which there are as many varying interpretations as there are circuits – *i.e.* the appropriate circumstances under which credibility choices of the ALJ must be rejected. Though all circuits seemingly concur that these choices are subject to review and may be reversed, the stated justification for so doing covers the panorama from a finding that the choices in question were merely incorrect in view of the preponderance of the evidence (*NLRB v. International Longshoremen's & Warehousemen's Union*, 514 F.2d 481, 483 (9th Cir. 1975)), to the requirement that they be found "hopelessly incredible" (*NLRB v. Columbia University*, 541 F.2d 922, 928 (2d Cir. 1976)). A full review of the varying standards currently in vogue, evidencing the checkerboard uncertainty of expectable results, is found in footnote 2 of Judge Gee's dissent (A-5, 6). Moreover, since the standard for reviewing credibility findings of other agencies under the Administrative Procedure Act (5 U.S.C. § 551, *et seq.* (1970)) is identical to that in NLRB cases (*Universal Camera*, *supra* at 487), assertion of certiorari jurisdiction in this case will permit clarification of the review standard to be followed in all cases arising under the

Administrative Procedure Act. 6/

As Judge Gee noted in his dissent (A-14), "[o]nly by calling attention to [an ALJ's] departures and refusing to enforce the Board's order to the extent it is based on such departures can we ensure that the administrative hearing fairly and efficiently serves its intended function." By like token, when the Courts of Appeals stray from the review standard enunciated in *Universal Camera*, intervention by this Court becomes necessary to ensure that the review responsibilities entrusted to those courts are carried out in accordance with Congress' legislative will. It is to this end that this Petition is directed.

6/ Illustrative of the uncertainty over the standard of review applicable to credibility findings made by other administrative agencies are *Breeden v. Weinberger*, 493 F.2d 1002, 1010 (4th Cir. 1974) (credibility determinations "based on improper or irrational criteria" cannot be sustained) and *Fairbank v. Hardin*, 429 F.2d 264, 268 (9th Cir.), *cert. denied*, 400 U.S. 943 (1970) (findings must be "hopelessly incredible or flatly contradict either a 'law of nature' or undisputed documentary evidence").

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that certiorari should be granted in this case.

Respectfully submitted,

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San Antonio, Texas 78205

Attorneys for Petitioner
Centeno Super Markets, Inc.

By George P. Parker, Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) true and correct copies of the foregoing Petition for Writ of Certiorari have been served to all parties required to be served as follows:

Mr. Elliott Moore
National Labor Relations Board
Washington, D.C. 20570

Solicitor General
5614 Department of Justice Office
Washington, D.C. 20530

by United States Mail, postage prepaid and properly addressed, this 8th day of November, 1977.

George P. Parker, Jr. Pres. M.A.S.
George P. Parker, Jr.

[4258] [4258]

APPENDIX "A"

[4258] CORRECTED

N.L.R.B. v. CENTENO SUPER MARKETS, INC.

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

CENTENO SUPER MARKETS, INC., Respondent.

No. 76-1577.

United States Court of Appeals, Fifth Circuit.

July 5, 1977.

National Labor Relations Board applied for enforcement of order. The Court of Appeals held that (1) finding that employees were fired because of their prounion activity was supported by substantial evidence; (2) order requiring reinstatement of terminated employees was proper and not overly broad.

Enforced.

Gee, Circuit Judge, filed opinion concurring in part and dissenting in part.

1. Labor Relations Key 561

National Labor Relations Board's affirmance of administrative law judge's findings and conclusions that employees were fired because of their prounion activity was supported by substantial evidence. National Labor Relations Act, § 8(a)(1) as amended 29 U.S.C.A. § 158(a)(1).

2. Labor Relations Key 633

Proposed order of administrative law judge, as amended by the National Labor Relations Board, directing reinstatement of employees discharged for prounion activities, was proper and not overly broad. National Labor Relations Act, § § 3(b), 8(a)(1, 3) as amended 29 U.S.C.A. § § 153(b), 158(a)(1, 3).

Application for Enforcement of an Order of the National Labor Relations Board (Texas Case).

Before GODBOLD, SIMPSON and GEE, Circuit Judges.

PER CURIAM:

The National Labor Relations Board (Board) asks for enforcement of the Board's Decision 1/ Order relating to the Centeno Super Markets, Inc., (Centeno) San Antonio, Texas. The primary issue is whether there was substantial evidence on the record as a whole to support the Board's findings that Centeno (1) violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S. Code, Section 158(a)(1), by interrogation and surveillance of employees, threats of reprisals against employees if they selected a union, and the granting of wage

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1/ Reported at 220 NLRB No. 178.

increases and other new benefits to discourage self-organization of its employees, and (2) also violated Section 8(a)(3) and 8(a)(1) of the Act, 29 U.S. Code, Section 158(a)(3) and 158(a)(1), by discharging 10 employees because they supported unionization. Additionally, respondent Centeno raises a question as to whether the Board's order was overly broad, and hence improperly required the reinstatement of terminated employees.

Centeno is a family owned business composed of three grocery markets in San Antonio, Texas. In July, 1974, Retail Clerks Union, Local 455, began organizational efforts at Centeno's three stores, with the first meeting occurring on July 22. Within a few weeks of this meeting several employees were discharged. The Board found that the employees were fired because of their pro- [4259] union activity. This was supported by the testimony of the fired employees, and by the fact that most of the employees involved had signed union authorization cards. Centeno contends that the discharges occurred for good cause, and that the company was practically unaware of any union activity by the employees involved. The Administrative Law Judge, on the whole, credited the testimony of the employees, and discredited the testimony of the company, and found that Centeno had violated § § 8(a)(1) and 8(a)(3) of the Act.

The Administrative Law Judge's decision was reviewed by a three-member panel of the Board, pursuant to Section 3(b) of the National Labor Relations Act, 29 U.S. Code, Section 153(b). The panel affirmed the ALJ's rulings, findings, and conclusions, with some slight modifications.

[1] As we have stated, *Great Atlantic and Pacific Tea Co. v.*

N.L.R.B., 354 F.2d 707, 709 (5th Cir. 1966), "[w]e cannot disturb the Board's choice if there is a fair conflict between the employer's testimony and a reasonable inference of discrimination." In view of the scope of our review of Board orders, we find the Board's affirmance of the Administrative Law Judge's findings and conclusions that the company's discharging of the involved employees was discriminatorily motivated is supported by substantial evidence, and is therefore conclusive. See *N.L.R.B. v. Link-Belt Co.*, 311 U.S. 584, 61 S.Ct. 358, 85 L.Ed. 368 (1941). The ALJ and the Board made legitimate credibility choices between conflicting versions of events, and drew legitimate inferences from the evidence presented.

[2] We further find that the proposed order of the Administrative Law Judge, as amended by the Board, is both proper and not overly broad, and decline to disturb it. "The particular means by which the effects of unfair labor practices are to be expunged are matters 'for the Board not the courts to determine.' " *Virginia Electric & Power Co. v. N.L.R.B.*, 319 U.S. 533, 539, 63 S.Ct. 1214, 1218, 87 L.Ed. 1568, 1574 (1943).

ENFORCED.

GEE, Circuit Judge (concurring in part and dissenting in part):

From the outset I emphasize the limited character of my disagreement with the majority of the court. The record, which chronicles a long hearing with sharply conflicting testimony from many witnesses, contains ample support for the conclusion that the opposition of the Centeno family and some of their supervisory employees to unionization crystalized into the commission of several unfair labor practices during Local

455's attempt to organize Centeno employees. My concern focuses upon what appears from the record and the decision of the Administrative Law Judge (ALJ) - affirmed by the Board in all respects - to have been an almost uniform discrediting of company witnesses and crediting of Board witnesses, in some circumstances when even the cold record militates for the opposite result. The ALJ's access to demeanor evidence 1/ normally places his credibility choices out of the reach of the reviewing court, but preservation of the utility and fairness of the administrative hearing requires that we decline to follow him on the rare occa- [4260] sion when he lists too far to either side. This appears to me to be that rare case, and since the majority would enforce the Board's order in its entirety, I must respectfully dissent from the grant of enforcement of the orders for reinstatement of Dolores Mireles and Anita Gonzalez.

We have the power to resolve questions of credibility against the choices made by the ALJ "in a proper case," *NLRB v. American Art Industries, Inc.*, 415 F.2d 1223, 1227 (5th Cir. 1969), 2/ although it is difficult to articulate standards for

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1/ *See NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408, 82 S.Ct. 853, 855, 7 L.Ed.2d 829, 832 (1962), *rev'g NLRB v. Florida Citrus Canners Cooperative*, 288 F.2d 630 (5th Cir. 1961), *and NLRB v. Walton Mfg. Co.*, 286 F.2d 16 (5th Cir. 1961).

2/ Almost with one voice the Courts of Appeal for other circuits agree, although differing standards are used. *See, e.g., NLRB v. Bangor Shoe Mfg. Co.*, 308 F.2d 948, 949 (1st Cir. 1962) (credibility choice subject to review "when it oversteps the bounds of reason" or the Board has "fallen into a clear mistake"); *NLRB v. Columbia University*, 541 F.2d 922, 928 (2d Cir. 1976) (credibility choice to be overturned when "on

[4260]

determining just what constitutes a "proper case." We have, for example, denied enforcement when the Board's order depended on acceptance of the testimony of two crucial Board witnesses and the hearing examiner had "expressed a theory of credibility that was so far foreign to that which he should have applied that '[s]ound reason . . . require[d] us to decline to go with the Examiner . . .' " in crediting and discrediting testimony. *NLRB v. Florida Citrus Canners Cooperative*, 311 F.2d 541, 543 (5th Cir. 1963), on remand from *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 82 S.Ct. 853, 7 L.Ed.2d 829 (1962).

2/ (Continued)

its face it is hopelessly incredible"); *NLRB v. Jackson Maintenance Corp.*, 283 F.2d 569, 570 (2d Cir. 1960) (choice not determinative when the record creates "doubts with respect to the truthfulness of the witness so powerful that they outweigh any evaluation based upon demeanor"); *NLRB v. Armcor Industries, Inc.*, 535 F.2d 239, 241 n. 3 (3d Cir. 1976) (court may question ALJ's judgment where his explanation of credibility choice is "clearly insufficient"); *NLRB v. Holly Farms Poultry Industries, Inc.*, 470 F.2d 983, 985 (4th Cir. 1972) (credibility findings must be accepted when supported by "substantial evidence on the whole record"); *NLRB v. Elias Brothers Big Boy, Inc.*, 327 F.2d 421, 426 (6th Cir. 1964) (reversing credibility finding where examiner "credited the testimony of a highly prejudiced and interested witness and discredited the testimony of all witnesses to the contrary"); *NLRB v. Wagner Iron Works*, 220 F.2d 126, 142 (7th Cir. 1955), *cert. denied*, 350 U.S. 981, 76 S.Ct. 466, 100 L.Ed. 850 (1956) (choices may not be disturbed "unless we can say that the credited witnesses could not possibly be believed"); *NLRB v. Morrison Cafeteria*, 311 F.2d 534, 538 (8th Cir. 1963) (credibility resolution reviewable only if "shocking to our conscience"); *NLRB v. International Longshoremen's & Warehousemen's Union*, 514 F.2d 481, 483 (9th Cir. 1975) (reverse credibility findings only if "a clear preponderance of the evidence convinces that they are incorrect"); and *Santa Fe Drilling Co. v. NLRB*, 416 F.2d 725, 729 (9th Cir. 1969) (overturn credibility assessment if it "contains clear error").

[4261]

Additionally, although an ALJ's uniform resolution of credibility questions in favor of Board witnesses and against company witnesses cannot of itself support a finding of improper bias vitiating his choices, *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659-60, 69 S.Ct. 1283, 1285, 93 L.Ed. 1602, 1606 (1949); *NLRB v. Bush Hog, Inc.*, 405 F.2d 755, 756 (5th Cir. 1968), 3/ we have found that such a pattern of consistent credibility decisions at least justifies a closer scrutiny of the record than might otherwise be undertaken. *NLRB v. Walton Mfg. Co.*, 286 F.2d 16, 21 (5th Cir. 1961), *rev'd on other grounds*, 369 U.S. 404, 82 S.Ct. 853, 7 L.Ed.2d 829 (1962). Here the ALJ's written decision contains only one instance of discrediting [4261] the testimony of employees, 4/ against a background of consistent crediting of Board witnesses at the expense of the company. Thus, closer scrutiny becomes appropriate here, and upon its application I find at least two of the reinstatement orders lacking in evidentiary support and thus unworthy of enforcement.

The first of these concerns Dolores Mireles, a telephone operator in the courtesy booth of one of Centeno's stores. On July 22, 1974, she signed a union authorization card in a union meeting on the store parking lot after closing hours. She was

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3/ This rule is as it should be; it is hardly inconceivable that on occasion one side in a dispute could be entirely in the wrong and the other entirely in the right.

4/ Three employees testified that company president Eloy Centeno, while discussing improved benefits with company employees, asked if any of them had signed a union card. Discrediting their testimony, the ALJ found that the evidence failed to support a charge of unlawful interrogation of employees.

discharged, at the direction of store manager Lansdale, when she reported to work on July 24. Lansdale and grocery manager Karam testified to Mireles' history of excessive talking to other employees and use of the telephone for personal calls, both hers and those of other employees; both testified that Lansdale had wanted to fire Mireles about six weeks before her actual discharge but that Karam had intervened and received permission to give her one more chance after a stern warning about personal phone calls and talking. Lansdale testified that the final decision to discharge her came after he observed a playful pushing and shoving incident between Mireles and a sackboy as she issued him a clean apron on the evening of July 23. Mireles denied that the apron incident occurred and initially denied that she had ever been warned about excessive talking or personal phone calls, although the latter testimony was undermined on cross-examination.

The ALJ found that assistant manager Jaramillo observed the union meeting at which Mireles signed her union authorization card and that he asked Mireles the next day whether she signed a card. Jaramillo denied any such interrogation, but the ALJ found that he was trying to conceal what actually occurred and credited Mireles' account over Jaramillo's denial. From other circumstances, 5/ he also found that Jaramillo informed

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5/ Ms. Mireles testified that she was in the courtesy booth on Tuesday evening, July 23, when Lansdale came into the booth and used one of the telephones. She said that she heard Lansdale speaking of the previous night's meeting and the fact that several employees had signed union authorization cards. She heard no more of the conversation because another phone rang and she had to answer it, but she testified that within a few minutes president Centeno arrived at the store and Lansdale "walked over like he was expecting him." Although Ms. Mireles avoided testifying

Lansdale of Mireles' signing of the card, that Lansdale was a "most untrustworthy witness," that the apron incident was a total fabrication, and that "Lansdale gave much conflicting testimony he thought would help the Company's cause." Disbelieving Lansdale, Jaramillo and Karam necessarily meant believing Mireles, whom the ALJ found to be an "honest, forthright witness," when the record creates strong doubts in my mind concerning her testimony. The ALJ lauded her, for example, for being "willing to admit any of her shortcomings," including allowing other employees to [4262] make outgoing nonessential telephone calls not permitted by the manager. Aside from the fact that consistently breaking rules speaks as eloquently for dishonesty as for honesty, Mireles had earlier testified that she did *not* allow nonemergency phone calls after she became aware of the rules; backtracking and modifying testimony under such circumstances hardly makes her an "honest, forthright witness." Much more of an eye-opener, pertinent to the ALJ's misapprehension of his duty in judging her credibility, is the following passage from his opinion:

> When subjected to lengthy, vigorous cross-examination, she even agreed with the counsel's characterization of a mistake in her pretrial affidavit as a "lie," although her testimony is clear that it was an unintentional error.

5/ (Continued)

that she knew Lansdale was speaking to Centeno on the telephone, the ALJ wrote in his decision that the person on the other end of the line was "presumably President Centeno" and found from these circumstances that Centeno did find out about union activity on July 23 and personally participated in the July 23 decision to fire Ms. Mireles for fabricated reasons.

The questioning which led up to her admission of lying under oath went as follows:

> Q: Ms. Mireles, were you ever warned by anybody . . . about excessive talking or misuse of the telephone?
>
> A: No, sir.
>
> Q: At no time . . . were you warned?
>
> A: No, sir.

She was then confronted with the transcript of her testimony in a Texas Employment Commission hearing on her request for unemployment benefits, during which she was asked if she had ever been "counseled" (the questioner's word) concerning excessive talking and personal telephone use; she had replied, "I was up at Mr. Karam's office one time, and he did *warn* me. It was a *warning* that there was a little too much talking going on." Cross-examination continued, with Mireles insisting first that Karam's statement had not amounted to a warning and then that it was not specifically directed at her. Eventually, she was read the following passage from her affidavit to the General Counsel of the NLRB:

> At no time during my employment was I told or warned by any supervisor to stop any type of conduct that would lead to my discharge. I was never verbally reprimanded by any supervisor.
>
> At no time did he [Karam] or anyone else tell or warn me about my breaking any of the rules.

In response to a direct question, Mireles finally admitted that the last sentence quoted above was a lie.

I am wholly unable to conclude that the ALJ properly exercised his power to resolve credibility questions when he rehabilitated Ms. Mireles as a witness by pointing to an admitted incident of lying under oath. I am baffled by his apparent finding that her statement in the pretrial affidavit was a "mistake" and that "her testimony is clear that it was an unintentional error." I find no testimony in the record - whether "clear" or otherwise - to the effect that the statement was a mistake or an unintentional error, and thus no evidentiary support for the ALJ's unequivocal assertion to that effect. The finding that Ms. Mireles was unlawfully discharged for specious reasons rested on the finding that her testimony was believable. The record displays a pattern of evasions and several belated admissions that prior statements of hers were less than accurate. Because I consider that the ALJ in crediting a witness on the basis of her admission of prior perjury "expressed a theory of credibility that was . . . far foreign to that which he should have [4263] applied," *NLRB v. Florida Citrus Canners Cooperative*, 311 F.2d 541, 543 (5th Cir. 1963), I would deny enforcement of the order to reinstate Ms. Mireles with back pay.

I also believe the ALJ and the Board took leave of the record in considering the firing of grocery checker Anita Gonzalez. She signed and delivered to a union representative her authorization card on July 24, 1974; she was terminated on July 26. She testified, and the ALJ found, that July 25 was her day off and that she was called to president Centeno's office on July 26 and fired for telling other workers of the need for union seniority, using herself (and her recent change to night hours despite her 16 years with the store) as an example. The company's version

[4263]

of the firing was, of course, quite different. Reginaldo Trevino, a bread salesman whose route included the Centeno store where Ms. Gonzalez worked, testified that she was working on the evening of July 25 when he and his wife came through her checkstand with their groceries. In response to a routine "how are you doing" type of question, the salesman testified, Ms. Gonzalez launched into a venomous, cursing description of what she would like to see happen to president Centeno; after leaving the store, the salesman and his wife discussed the incident and decided that Centeno should know of it. The next day while servicing the store Mr. Trevino went to Centeno's office and informed him of the previous evening's episode. Shortly thereafter, Ms. Gonzalez was called into president Centeno's office and asked about her attitude. The "tirade" into which she then launched resulted in her dismissal. Trevino's, wife, who was under the Rule and thus not in the courtroom when he testified, corroborated his account with her testimony.

The ALJ's explanation of why he chose to believe Ms. Gonzales' version of the firing and disbelieve the Trevinos and Centeno illustrates his selective highlighting of supportive sections of some mixed-bag testimony while conveniently ignoring the almost-inseparable, less supportive parts and his undue emphasis on factors which provide only flimsy support for his choice. He found, for example, that the Trevinos' testimony was not convincing because it sounded "contrived," partly because Ms. Gonzalez was alleged to have used a quite vulgar Spanish expression in describing her wishes for Centeno, and because she was alleged to have said it "with a lot of malice in her heart." Of course, people ofttimes use vulgar expressions, in which case factual reporting must contain those same vulgar words (or, as here, their translations), and they often do so because they are angry, or have "a lot of malice" in their hearts.

He noted also that the incident was not reported to president Centeno until a day later, but the Trevinos testified that it was not until after they got away from the unpleasant scene and discussed it that they decided that Centeno should be informed of it, and it was certainly understandable for Trevino to wait until the next day when his bread route would take him to the store three or four times rather than turning back to the store in the evening when they presumably had other places to go and president Centeno might not be in the store. The ALJ further noted that "Gonzalez is not accused of ever using such language, or cursing Centeno or the store, at any time before." He thus conveniently limited the objects of her cursing so as to exclude store manager Benavides, who, according to employee Enriqueta Vasquez, Gonzalez several times called "jotinche" (effeminate man) or "joto" (queer) with [4264] appropriate embellishments. The ALJ stated that he had considered the testimony of Vasquez, who testified that "she never heard Gonzalez make any derogatory remarks about [president] Eloy Centeno or any of the Centeno family." Again, it is the omission that deafens; Vasquez also testified that she *did* see Gonzalez make bad, mocking faces behind Centeno's back on several occasions. Finally, the ALJ noted that Gonzalez denied seeing the Trevinos in the store on the day in question, but he passed over Mr. Trevino's identification of the check with which he paid for the groceries - strong evidence that he was indeed in the store. In short, the ALJ appears to have shored up a questionable choice in favor of Gonzalez' testimony by editing testimony of some witnesses and by using factors which as strongly support the conflicting testimony of the Trevinos and president Centeno as the testimony of Gonzalez. Discounting what I consider to have been the erroneous reasoning in the credibility area, I am unable to conclude with him that the firing of Ms. Gonzalez was on a pretext designed to cover up

unlawful motivation. Accordingly, I would deny enforcement of the order to the extent that it requires her reinstatement with back pay.

The deference which we accord an Administrative Law Judge in cases such as this reflects our understanding of the undoubted advantage he possesses in hearing the witnesses, seeing their mannerisms, experiencing their fits and starts and evasions. But when his choices veer toward incredibility, we must cease to defer to them as sheltered credibility choices. Only by calling attention to his departures and refusing to enforce the Board's order to the extent it is based on such departures can we ensure that the administrative hearing fairly and efficiently serves its intended function. To that end I direct this dissent.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner,	)	
v.	)	No. 76-1577
CENTENO SUPER MARKETS, INC., Respondent.	)	

JUDGMENT

FILED: July 27, 1977

Before: GODBOLD, SIMPSON and GEE, Circuit Judges.

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent, Centeno Super Markets, Inc., San Antonio, Texas, its officers, agents, successors, and assigns on October 8, 1975. The Court heard argument of respective counsel on February 2, 1977, and has considered the briefs and transcript of record filed in this cause. On July 5, 1977, the Court being fully advised in the premises, handed down its opinion granting enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is hereby ordered and adjudged by the United States Court of Appeals for the Fifth

Circuit that the said order of the National Labor Relations Board in said proceedings be enforced, and that Respondent, Centeno Super Markets, Inc., San Antonio, Texas, its officers, agents, successors, and assigns abide by and perform the directions of the Board in said Order contained.

ENTERED: July 27, 1977

ISSUED AS MANDATE:

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

September 26, 1977

EDWARD W. WADSWORTH
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

TO ALL PARTIES LISTED BELOW:

NO. 76-1577 - NATIONAL LABOR RELATIONS BOARD v. CENTENO SUPER MARKETS, INC.,

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing,** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

**on behalf of respondent, Centeno Super Markets, Inc.,

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ Brenda M. Hauch
Deputy Clerk

cc: Messrs. Elliott Moore
Jay Shanklin
Charles Shaw
Messrs. George P. Parker, Jr.
John N. McCamish, Jr.
C. J. Fitzpatrick

APPENDIX "D"

220 NLRB No. 178 FJP

D–430
San Antonio, Tex.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CENTENO SUPER MARKETS, INC.

and Cases 23–CA–5205,
23–CA–5246, and
23–CA–5277

RETAIL CLERKS UNION,
LOCAL NO. 455, CHARTERED BY
THE RETAIL CLERKS INTER-
NATIONAL ASSOCIATION, AFL–CIO

DECISION AND ORDER

On June 26, 1975, Administrative Law Judge Marion C. Ladwig issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, 1/

1/ Respondent has excepted to the Administrative Law Judge's failure to disqualify himself on his own motion pursuant to Sec. 102.37 of the National Labor Relations Board Rules and Regulations, Series 8, as amended. In support of its exception, Respondent asserts in its brief that after the Administrative Law Judge rendered his Decision it learned that prior

and the General Counsel filed a brief in support of the Administrative Law Judge's Decision. 2/

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, 3/ findings, 4/ and conclusions of the

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1/ (Continued)
to 1966 or 1967, when the Administrative Law Judge was in private practice, he personally represented the Charging Party in proceedings before Region 23 of the National Labor Relations Board. We find no merit in this exception. Contrary to Respondent, we do not believe that the Administrative Law Judge should be disqualified in the instant case simply because he represented the Charging Party in other proceedings 8 or 9 years earlier.

2/ Respondent's request for oral argument is hereby denied, as the record, including the briefs, adequately presents the issues and the positions of the parties.

3/ Although we find merit in Respondent's contention that the Administrative Law Judge erred in admitting into evidence an unauthenticated tape recording of Dolores Mireles' hearing before the Texas Employment Commission, we conclude that, in the circumstances of this case, this error is not prejudicial because it does not affect his findings and conclusions or our adoption thereof.

4/ In addition to its exception to the Administrative Law Judge's failure to disqualify himself (see fn. 1, *supra*), Respondent asserts that the Administrative Law Judge's resolutions of credibility, findings of fact, and conclusions of law are the result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit.

Administrative Law Judge and to adopt his recommended Order as modified herein. 5/

4/ (Continued)
There is no basis for finding that bias and partiality existed merely because the Administrative Law Judge resolved important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in *N.L.R.B.* v. *Pittsburgh Steamship Company*, 337 U.S. 656, 659 (1949), "[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact." Furthermore, it is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We find no basis for reversing his findings.

5/ As Respondent's 8(a)(3) violations go to the very heart of the Act, we shall modify the Administrative Law Judge's recommended Order and notice by substituting a broad cease-and-desist order for the narrow one recommended by him. See *Pan American Exterminating Co., Inc.*, 206 NLRB 298, Board's fn. 1 (1973).

We find merit in Respondent's exception to the use by the Administrative Law Judge of the term "spy" for "surveillance" in the notice he attached to his Decision. *Solo Cup Company*, 208 NLRB 976, Board's fn. 1 (1974). Similarly, we agree with Respondent that the following language is not appropriate for inclusion in the notice: "WE WILL NOT grant any wage increases or other benefits in the future *to turn you against a union*" (emphasis supplied). Lastly, we find merit in Respondent's contention that the following provision in the notice is overly broad because it encompasses conduct not violative of Sec. 8(a)(1): "WE WILL NOT tell any of you that we will not rehire any employee for 6 months as an excuse for not rehiring an employee." We shall therefore modify the Administrative Law Judge's notice accordingly.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Centeno Super Markets, Inc., San Antonio, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(g):

"(g) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under Section 7 of the Act."

2. Substitute the attached notice for the Administrative Law Judge's notice.

IT IS FURTHER ORDERED that the complaint be, and it hereby is, dismissed insofar as it alleges violations not found herein.

Dated, Washington, D.C.

October 8, 1975

John H. Fanning, Member

Howard Jenkins, Jr., Member

John A. Pennello, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT discharge or otherwise discriminate against any employee for supporting Retail Clerks Union, Local No. 455, chartered by the Retail Clerks International Association, AFL–CIO, or any other union.

WE WILL NOT grant wage increases or other benefits in the future to thwart our employees' union organizational efforts.

WE WILL NOT coercively interrogate any employee about union support or union activities.

WE WILL NOT coercively engage in surveillance of our employees' union activities.

WE WILL NOT threaten to employ fewer employees or reduce hours of work if our employees select a union.

WE WILL NOT inform any employee that employees may not be rehired for 6 months as a pretext for discriminatorily refusing any employee reinstatement.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed under Section 7 of the Act.

WE WILL offer Segundo Arguello, Dean Diaz, Enrique Escamilla, Jesse Flores, Anita Gonzalez, Raul Herrera,

Joe Lopez, Mark Martinez, Dolores Mireles, and Johnny Ramos immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for their lost earnings plus interest.

CENTENO SUPER MARKETS, INC.
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, One Allen Center, 500 Dallas Avenue, Suite 920, Houston, Texas 77002, Telephone 713--226--4296.

[1] [1]

APPENDIX "E"

[1]

JD-374-75
San Antonio, TX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

CENTENO SUPER MARKETS, INC.

and **Cases 23-CA-5205**
23-CA-5246
23-CA-5277

RETAIL CLERKS UNION, LOCAL NO. 455, chartered by the RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO

Jorge H. Torres, Esq., for the General Counsel.
George P. Parker, Jr., and *John N. McCamish, Jr., Esqs. (Matthews, Nowlin, Macfarlane & Barrett)*, of San Antonio, TX, for the Respondent.
Mr. Juan Sierra, Jr., for the Charging Party.

DECISION

Statement of the Case

MARION C. LADWIG, Administrative Law Judge: These

[1] [2]

consolidated cases were tried at San Antonio, Texas, on January 14–16 and 20, and February 10–13 and 17–21, 1975. Charges were filed by the Union on August 5, September 10, and October 1, 1974; 1/ complaints were issued on September 25 and November 19 (and amended at the trial); and the cases were consolidated on November 19 and 20.

During the first week of the Union's active organizational campaign, the Respondent Company discharged, laid off, or suspended one or more of the union supporters at each of the Company's three supermarkets, and about 3 weeks later, terminated most of its part-time employees at the store where the Union's support was the strongest. The primary issues are whether the Company (a) discriminatorily discharged 10 of the employees and (b) coerced the employees by engaging in unlawful interrogation and surveillance, threatening the loss of work, granting wage increases and other benefits, discriminatorily enforcing a no-solicitation policy, and engaging in other illegal conduct, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act.

[2] Upon the entire record, 2/ including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Company, I make the following:

1/ All dates are in 1974 unless otherwise stated.

2/ The Company's second amended answer, filed at the trial, is hereby included in the exhibits as G.C. Exh. 2(a).

[2] [2]

Findings of Fact

I. Jurisdiction

The Company, a Texas Corporation, is engaged in the retail grocery business at three supermarkets in San Antonio, Texas, where it annually purchases goods valued in excess of $50,000 directly from outside the State and sells goods valued in excess of $500,000. The Company admits, and I find, that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act. The Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. *Introduction*

With two exceptions, this is an ordinary, run-of-the-mill case, involving contentions that the Company defeated the Union's 1974 organizational drive at its three supermarkets by discriminatorily discharging 10 employees because of their union support, and by otherwise coercing the employees and interfering with their Section 7 rights.

The first exception is that the Company's two top officials testified that they were *pro-union*. Jose Centeno, the chairman of the board, testified upon questioning by company counsel that it "would be nice" for a union to come in and represent his employees, that it would "maybe help my business, on account of it would be union." Similarly his son, President Eloy Centeno, testified, "I feel I've been pro-union all my life . . . For my people" (referring to the Mexican-Americans, and particularly to his assistance to Cesar Chavez and the Farm

[2]

Workers), and that he is also pro-union in "even my own business . . . Including now." However, President Centeno later testified that he felt his employees should have the "right" union. Moreover, Attorney John McCamish (one of the Company's counsel at the trial) testified that after President Centeno first contacted him on July 30 (during the week following the initial terminations at all three stores), he met on August 1 with supervisors at Store No. 3 (where most of the part-time employees were later terminated) and gave the supervisors a list of DOs and DON'Ts for use in the campaign. (I note that paragraph 5 of the DOs permit the supervisors to "Tell employees of the *disadvantages* of belonging to a union," and paragraph 19, to "Actually *campaign against* a union seeking representation of your employees." (Emphasis supplied.)

The other exception is the great length to which some of the witnesses were examined. Although this contributed to prolonging the trial, [3] it afforded me an opportunity to observe the demeanor of the witnesses under vigorous cross-examination, which in some instances strengthened rather than impugned their credibility.

B. *Alleged Discriminatory Discharges*

1. Dolores Mireles

The Union began its active organizational campaign at Store No. 3 on July 22. Mireles, a courtesy booth operator, and a group of other employees (mostly grocery sackers and stockers, many of whom were terminated about 3 weeks later) signed union authorization cards at a meeting on the store parking lot after work that evening, while being watched from inside the door by Assistant Grocery Manager Rudy Jaramillo.

[3]

On July 23, several hours after Mireles admitted to Jaramillo that she had signed a union card, and about an hour after President Centeno arrived at the store and conferred with Store Manager Daryl Lansdale, the store manager telephoned Mireles' immediate supervisor, Assistant Manager Eugene Karam, at his home and ordered him to discharge her summarily the following morning if a replacement could be found. Before work the next morning, Wednesday, July 24, Karam followed the instructions and discharged her for talking, although he admittedly did not want to do so and did not feel that her conduct merited termination. After weighing the mass of evidence concerning her discharge, and all the circumstances, I find that the Company seized on the fact that she had been cautioned or warned about talking approximately 6 or 8 weeks earlier, and discriminatorily discharged her to undercut the Union's organizational drive.

Miss Mireles, at age 19, was employed in January as a cashier at a checkout counter in Store No. 3, the Company's newest store which has both a grocery side and a department store side, separated by a mall. In April, because she was bilingual, had a good personality, and was friendly and able to deal well with customers, she was assigned regularly to work as a courtesy booth operator in the middle of the mall. Her duties included operating the telephone switchboard (handling incoming and outgoing calls), selling various items and receiving some customer complaints, verifying checks for cashiers working at the checkout stands lined up on either side of her booth, checking prices or calling someone through the intercom for the cashiers, and issuing clean aprons to the sackers and stockers (also called package boys and stock boys). About the latter part of May, Assistant Manager Karam called her to his office and cautioned or "warned" her about too much talking at the courtesy booth. (A head cashier would sometimes stand at the booth and talk

[3]

to her; a cashier, while awaiting some information, might ask her something personal – like what she did the night before; she might talk business with a cashier and then briefly continue the conversation if she was not busy; or President Centeno's son would come to the booth, asking for a date or just wanting to chat. She carefully abided by the rule against talking with any of her personal friends who might come by.) She thought that Karam's "warning" applied to the others as well, and credibly testified that she was never warned of being discharged. Karam admitted that following this warning (which he claimed was a warning of discharge, ordered by Store Manager Lansdale), Mireles followed his instruction for "the most part."

[4]

[4] Mireles credibly testified that as she left the store about 9:15 on Monday evening, July 22, she saw Assistant Grocery Manager Jaramillo come up to the door and begin looking at the assembling employees. The parking lot lights were then on. She recognized International Representative Juan Sierra with the employees, and approached him just as the parking lot lights went out. He handed her a union card, which she signed and returned to him. As Mireles credibly testified on cross-examination, it was not very dark when she signed the card "because the lights from the store were still on, and the street lights were on." She told two other girls, Rosa Lopez and another, about "what the Union represented," and saw both of them sign cards. Other employees were also signing the cards, as Jaramillo was still standing at the door, "looking out at us." (Jaramillo admitted that he saw a group of about 15 to 25 people in the parking lot at 25 feet from where he was standing. I discredit his claim that he was at the door only "about a minute or two," that it was too dark for him to recognize anybody, that he "just saw persons out there, no telling who they were," and that he could not tell "the color of the clothing they were wearing, or nothing.")

[4]

[4]

The following afternoon, Tuesday, July 23, as Mireles credibly testified, Assistant Grocery Manager Jaramillo went to her booth about 5 p.m., asked her about being "out there last night," and asked, "Did you sign the card they handed to you?" She answered yes, and he asked why. She answered that she wanted union representation for better wages and benefits. Jaramillo denied this interrogation, but testified that he did talk earlier that afternoon with two girls who wanted back the union cards they signed the night before. (One of them was the same Rosa Lopez, whom Mireles had encouraged to sign a card. Lopez did not testify.) Jaramillo claimed that he just kept this information about the union activity to himself, and did not tell anybody about it until he told Lansdale, on the Thursday "when we had a meeting" (on August 1, the date fixed by company counsel McCamish). Although Jaramillo positively denied that he ever discussed the Union with President Centeno, this denial was contradicted by Centeno who testified that on the following day, July 24, Jaramillo, "the assistant store manager," told him that "some people were giving out cards at the parking lot." Jaramillo appeared to be attempting to conceal what actually happened, and I discredit his denial of the interrogation, and his claim that he merely kept the union information to himself and did not tell anybody about it until he told Lansdale several days later. From all the circumstances, I also draw the inference that instead of keeping the information to himself, he promptly notified Lansdale.

About 8:15 that Tuesday evening, as Mireles further testified, Store Manager Lansdale came to the courtesy booth and used one of the telephones. (Lansdale has an office in the store, but it was measured during the trial to be about 215 feet away. It is undisputed that Lansdale followed the practice of leaving his coat at the courtesy booth in the evenings – evidently to avoid

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going that distance to his office.) Mireles noticed that Lansdale dialed out and overheard him telling somebody (presumably President Centeno) that he had learned that there were some union representatives over last night and "they had talked to some employees about signing cards that they were passing out." (It was the next day that Centeno returned to Store No. 3 and talked personally to Assistant Grocery Manager Jaramillo about what Jaramillo had observed.) The other telephone then rang, and Mireles did not overhear anything else [5] Lansdale said on the telephone. Before leaving the booth, Lansdale asked Mireles about her schedule the next day. (This question evidently indicated that he and Centeno had been discussing her discharge – although I deem it unlikely that Lansdale had considered taking such action when he used that telephone to report on the union activity.) Soon thereafter, Centeno arrived and Lansdale "walked over like he was expecting him." About 8:50, Lansdale came to the courtesy booth for his coat and left. Mireles saw him go to his car in the parking lot, and wait in the car with the lights off. After work that evening, she saw Lansdale driving very slowly around the building twice (evidently to determine if there was to be any union activity in the parking lot again that evening). It was about 9:30 that same evening that Lansdale telephoned Karam at home and ordered Mireles' discharge the next morning if Karam could get a replacement. Lansdale did not seek nor obtain Karam's agreement to discharge Mireles although, as Karam admitted on cross-examination, it was usually a joint agreement between himself and Lansdale when someone is terminated.

About 7:55 the next morning, Wednesday, July 24, Mireles asked Assistant Manager Karam about her timecard. Karam responded, "I have some bad news for you," and stated that she was fired for talking. Mireles credibly testified that she was shocked, and answered only, "O.K.," and left.

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Store Manager Lansdale denied that Assistant Grocery Manager Jaramillo had told him anything about the Union or Mireles on that Tuesday, July 23 (when Jaramillo interrogated Mireles about signing the union card), and even denied being the store manager. (Lansdale claimed that he was merely the department store manager – evidently to justify the lack of communication between himself and Jaramillo – although the Company admitted in its answers that Lansdale is the store manager, and Assistant Manager Karam testified that Lansdale "is the store manager" and "is in charge of the supervision of the entire store." Lansdale gave much conflicting testimony, and impressed me as being willing to give whatever testimony he thought would help the Company's cause.

Although Assistant Manager Karam had testified at the trial that he knew of no major incidents, occurring after Mireles' earlier warning, to justify her discharge, Store Manager Lansdale testified about a purported incident about which Karam undoubtedly would have heard if it had actually occurred. Lansdale – denying that he used the telephone at the courtesy booth to talk to anybody about the Union and also denying that he recalled seeing or talking to Centeno that evening – claimed instead that on that Tuesday evening he was standing "at kind of the side" of the courtesy booth and saw Mireles "arguing" with a sacker or stocker, whose identity he did not recall, about a charge of "25 cents," or "50 cents or such," or "a dollar" for an exchange apron. He claimed that they "even started pushing, pulling on the apron. And it lasted for maybe four or five minutes, laughing and carrying on. And I decided that that was all." (When recalled as a rebuttal witness, Mireles credibly testified that she was positive that she did not have such a discussion about charging money for an apron.) I agree with the General Counsel "that this incident was totally

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fabricated." (I find that Lansdale was also fabricating testimony when he claimed that he observed Mireles, *both* from his upper-level office and from the floor, talking "to everybody or most everyone that would come near her . . . Laugh and joke and carry on with the cashiers on both [6] sides of the [mall] as well as stock boys that would come pick up aprons and towels," and "laughing" and "carrying on" when holding lengthy telephone conversations. I note that after the distance from his office window to the courtesy booth was measured, Lansdale changed his testimony to state that he observed Mireles' "excessive talking" only "from downstairs on the floor.")

Whereas Lansdale impressed me as a most untrustworthy witness, Mireles appeared to be an honest, forthright witness, willing to admit any of her shortcomings (such as following the practice of the operator who trained her, in permitting other employees to make outgoing nonemergency calls without the management's knowledge). When subjected to lengthy, vigorous cross-examination, she even agreed with the counsel's characterization of a mistake in her pretrial affidavit as a "lie," although her testimony is clear that it was an unintentional error. (In crediting her testimony, I have also duly considered the adverse ruling by the appeals tribunal on her unemployment claim, following a TEC hearing in which the pretextual aspect of her discharge was not fully developed.)

Based on the foregoing findings, and after due consideration of all the evidence and the numerous arguments made by the parties in their briefs, I not only find that the asserted reasons for Mireles' discharge are pretextual and that she was discriminatorily discharged in violation of Section 8(a)(3) and (1) of the Act, but also that President Centeno's claim that he first

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heard about the union activity on July 24 is erroneous, and that he personally participated in the July 23 decision unlawfully to discharge Mireles, a valuable employee.

2. Enrique Escamilla

On Wednesday evening, July 24 (the day after President Eloy Centeno directed or approved the discriminatory discharge of Dolores Mireles), the Union held a meeting of company employees in the parking lot at Store No. 2, where Centeno's sister, Lelia Centeno Alfonsin (herein called Lillie Centeno), was in charge. Late the following afternoon, July 25, Lillie Centeno "laid off" Enrique Escamilla (a high school student who had been working since December 1, 1973) and another sacker, purportedly for lack of work, and that evening, President Centeno met with the sackers and stockers, and cautioned them to "be careful what you sign." Escamilla, believing that he had been discharged for supporting the Union, returned to the store that same evening and told Lillie Centeno that he was quitting, in an effort to avoid a blemish on his employment record. However, upon learning of his mother's displeasure over his quitting, he again spoke to Lillie Centeno and asked for his job back. Then, as Escamilla credibly testified, Lillie Centeno asked him if he had signed a union card and why he did so, and said that "she would talk to Eloy and tell him everything I told her," and it would be up to him to decide whether or not to take Escamilla back. Lillie admittedly talked to Centeno that evening about Escamilla wanting his job back. (Lillie also admitted having learned that evening that Escamilla had signed a union card, but claimed that Escamilla's mother, rather than Escamilla, so advised her.) Two days later, Centeno told General Manager J. P. Williamson (in Williamson's words) that there was a problem at Store No. 2 "with a couple of boys

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that had quit or been laid off or fired," and for him to go over and "take care of it." Williamson drafted a form, stating "I . . . do not [7] hold the store responsible for my leaving, and I left of my own free will." Escamilla refused to sign it.

In a continuing effort to regain his job, Escamilla went to Store No. 1 on September 3 and talked to President Centeno. (Meanwhile, the Union on August 5 had filed charges against the Company, alleging the discriminatory discharge of three other employees, but no Escamilla, who had not filed a charge because of the friendship between his mother and Lillie Centeno. Evidently not expecting a charge by Escamilla, Centeno openly discussed Escamilla's union support with him.) As Escamilla credibly testified, Centeno asked in the conversation, "Did you sign a union card?" and why he had signed. Centeno then asked, "Have you heard anything from the Union?" Escamilla answered no, and Centeno asked, "To your knowledge, do they still have your card." Escamilla answered, "I think they tore it up . . . because I had told thim I had quit at No. 2." Centeno responded, "Ya vez como es la rason" (meaning "You know how our people are"), because "when you're together it's fine, but then something goes wrong and they get mad at you." (They evidently were referring to International Representative Juan Sierra, who also is a Mexican-American.) Centeno said Escamilla "shouldn't have let them tear it up," that he should have gotten it back. (Despite Lillie Centeno's admission that she had learned that Escamilla had signed a union card before she talked to Centeno about Escamilla wanting his job back on Thursday evening, July 25, Centeno claimed that he first learned that Escamilla had signed a card in this conversation on September 3 when he asked why Escamilla had quit. I discredit this claim, and also Centeno's further implausible testimony that Escamilla answered that

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"he quit because he had signed a card and he was *having to go to meetings* [emphasis supplied] and his mother had gotten very upset" – notwithstanding the fact that Escamilla had signed the union card only 1 day before.) Then Centeno added that he "wasn't able to take me back in until six months after the day I had been fired or laid off or quit" because of a new policy against rehiring anybody for 6 months, "and that if he would take me in, he was going to have to take all the people . . . that had been laid off before back in" (referring to the part-time employees laid off from Store No. 3 on August 17, discussed later).

There is further credited evidence that the Company was aware of, or suspected, Escamilla's union support before his termination. As Escamilla was going to work on Wednesday, July 24, he signed a union card. After clocking in, he asked a friend in the store about signing one. About 7:30 or 8 p.m. that evening, he overheard Lillie Centeno tell security guard Santiago Gutierrez that she had noticed "that man" (later identified as a union volunteer worker, Joe Harmes) browsing around the timecards. (Harmes denied looking through or "gazing" at the timecards. However, he impressed me as being an untrustworthy witness, and I do not credit his testimony.) Escamilla suspected that this man was a union representative and later, after taking out some groceries for a customer, went over to Harmes and told him that Escamilla thought they knew who he was. Harmes confirmed that he was connected with the Union. When Escamilla reentered the store, Gutierrez asked what he and the man were talking about. "Well, at first I didn't want to tell him, and then he said, 'Come on,' you know, so I told him he was from the Union, and then [Gutierrez] told me that the Union wasn't going to help us at all, that it was only going to help full-time employees."

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[8] About 9:15 that same evening, July 24, the Union began holding the meeting outside Store No. 2 on the parking lot. Lights from the adjoining Big Star department store remained on, and Escamilla – from inside – recognized Dean Diaz, other sackers and stockers, and some checkers at the meeting. About 9:25, Chairman Jose Centeno arrived in his car to pick up Lillie Centeno. Escamillo took Lillie Centeno's groceries to the car for her, and overheard her instruct Gutierrez to order the people off the premises. Gutierrez talked both to Harmes (who claimed it was a church meeting) and to Union Representative Fernando Contreras (who admitted they were from the Union), and ordered the Union off the premises. Meanwhile Escamilla, in full view of Lillie Centeno and the security guard, approached Union Representative Lupita Hernandez (who had gotten Escamilla to sign a card on the parking lot that afternoon before work). Lillie Centeno was walking in the direction of the meeting, as credibly testified by a company witness, office employee Augusta Martinez (who had left the store with Lillie Centeno and who had gone to the meeting and talked to Contreras). Martinez left the meeting and as she was walking toward her own car (parked near the union meeting), she saw Lillie Centeno "who was walking towards the group already" and "was coming towards me," and told her it was just "something about the Union." (At this point, Lillie Centeno was a short distance from the assembled employees, including Escamilla whom she terminated the next day, and Dean Diaz whom she terminated 2 days later as discussed below. I discredit Lillie Centeno's testimony that she stayed in the car with Chairman Jose Centeno, and her claim that she does not remember seeing Escamilla or Diaz in the group – although she remembered seeing some girl checkers, in their red uniforms.) Lillie Centeno returned to Jose Centeno's car, where Harmes talked to Chairman Centeno before Jose and Lillie Centeno left.

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On the following afternoon, Thursday, July 25, Escamilla arrived early, about 4:45, "to find out if anything was going to happen because of the Union." (He was not scheduled to work, and came directly from the swimming pool, dressed in a tank shirt and shorts, without his uniform white shirt. Ordinarily he did not arrive that early, because of the criticism about clocking in early.) He met Dean Diaz, Jorge Saucedo, and other sackers and stockers on the parking lot, discussed briefly what had happened the night before, and then went inside to the Big Star cafeteria – noticing that Lillie Centeno was watching them. After a few minutes, he started to leave to go home, but spoke to checker Yolanda Mata, who was waiting to clock in. (Having come directly from the swimming pool, Escamilla did not have on his watch. However, he believes it was before 5 o'clock because Mata, the store manager's niece, always punches in at 5 o'clock in order not to set a bad example.) He then noticed that Lillie Centeno approached Jorge Saucedo. He could not hear what was being said, but after the conversation, Saucedo came to him and said, "Do you know what? . . . Lillie said for us not to come to work any more." As recalled by Saucedo, who was called as a rebuttal witness, "I went and told Enrique what Lillie told me, that he was not to punch in no more." Saucedo also confirmed that this was Escamilla's day off, and that Escamilla was dressed in shorts. (Saucedo credibly testified that he did not file charges himself, "Because my mother wouldn't let me." After his rebuttal testimony, I denied as untimely the General Counsel's motion to add Saucedo as an 8(a)(3) discriminatee. This motion has now been withdrawn in the General Counsel's brief.) Escamilla and Saucedo stepped outside and told Dean Diaz (who was still waiting to clock in) about the layoffs. They went inside to a [9] telephone near the Big Star cafeteria, and Diaz attempted in vain to contact Union Representative Sierra. Diaz then clocked in, somewhat late. As Escamilla and Jorge Saucedo were leaving, Escamilla

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went back inside and asked Lillie Centeno "if what Jorge had told me was true," and she answered yes. Escamilla asked "Why me?" and, as he credibly testified, she answered, "Well, we had to lay off some people because there wasn't any work."

In sharp contrast to this credited testimony, Lillie Centeno claimed at the trial that she was *short-handed* at the time, and that one day that week, she did not remember when, she told Escamilla to work on Thursday, his regular day off. Then on Thursday (July 25), when she saw Escamilla and Saucedo reporting to work late, a *little after 5 o'clock*, "walking towards the punch in card . . . just lagging off, talking away, both of them . . . that upset me," so she told them *both* to leave: "You are late. I want you here on time. You leave and don't come back until Monday now." A little later, according to her, "I was standing by the candy counter and Enrique came back inside and asked me if that meant that he was fired. And I said, 'No, Enrique. That means that you are to report to work Monday.' " In an effort to corroborate this version, the Company called security guard Gutierrez who testified that when Escamilla arrived to clock in, Lillie Centeno told him "just to go home, come back Monday." However, Gutierrez testified that Escamilla was *alone* and *did not say anything*, and that this occurred *around 4:45*. Gutierrez was certain that it was before 5 o'clock, because he himself was standing close to the time-clock, and "I am never late on my job and I am supposed to go to work at 5:00 o'clock." Thus Gutierrez contradicted Lillie Centeno's testimony that she talked to both Escamilla and Saucedo *after* 5 o'clock. Neither Lillie Centeno nor Gutierrez impressed me as being a candid witness. I discredit their conflicting versions as fabrications. (I also discredit Gutierrez' testimony on cross-examination that when he went to the parking-lot meeting the night before, "I didn't see any

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employees out there . . . they must have been . . . employees from some other stores.")

Lillie Centeno claimed that when she laid off or suspended Escamilla on Thursday, July 25, for being late for work, "All I knew" about the Union "was what Mrs. Martinez had told us" the night before; and also that she had not discussed the Union with Eloy Centeno (her brother), adding, "I don't find it important." However, when asked if she *ever* discussed the Union with her brother, she admitted telling Centeno about the July 24 parking-lot-meeting incident "I think the following day." Upon being asked, "The following day?", she first positively answered "Yes," but then – apparently realizing that the following day was July 25, the day Escamilla was laid off – she changed her testimony and claimed, "I don't remember very well. I just didn't find it important." Yet, she did not deny that that same evening, July 25, the Company considered the union organizing at Store No. 2 important enough for Centeno to appear at the store and meet with the stockers (telling them, as credibly testified by Dean Diaz, about "some people around the store trying to organize a union," and advising them to "be careful what you sign"). President Eloy Centeno disclaimed any responsibility for the layoff of Escamilla, although he admitted, "I would say yes," that Lillie always checks with him before she does anything of that nature (like hiring and firing). He also *positively denied* on cross-examination ever speaking with Lillie or with [10] his father, Jose Centeno, about the Union in July. When pressed further, "You have never talked about it?", he changed his testimony, stating, "Well, let me see," and then admitted that Lillie did talk to him about the Union on July 25, the day he had earlier testified he talked to his father, Lillie, Mrs. Martinez, and the security guard about the July 24 incident – when his father "went to pick up Lillie

and this guy Harmes had gone up to the car and smelled like a drunk and, of course, I pieced all the stories together, and I found out that's what it was all about, was the Union." Centeno gave conflicting testimony about what his father reported to him. On direct examination, Centeno testified that "No," his father did not tell him that Harmes was with the Union, but then when asked if his father told him that this drunk was with the Union, Centeno answered "Yes." Later, when Company Counsel George Parker asked him, "Are you positive that your father told you that somebody from the Union had been at Store No. 2?", Centeno answered, "I'm not positive, but he told me the Union was there, George. I mean I gathered all this information from Lillie and Mrs. Martinez and the deputy, and my father told me there had been a commotion there at the store that night. . . . I don't think he said" if anybody was there "from the Union. He said this drunk approached the car." (Centeno appeared to be attempting to find an answer which would help the Company's cause, rather than attempting to recount accurately what he had been told.)

After weighing all the evidence and circumstances, and also the apparent effort on the part of President Eloy Centeno and his sister, Lillie Centeno, to conceal their knowledge of the union activity at Store No. 2, I find that Centeno did participate in the decision to "lay off" Escamilla on a day he was not scheduled to work (intending it to be an actual discharge) on the pretext, at the time, that there was a lack of work. I also find that Lillie Centeno's claim at the trial that she suspended Escamilla from Thursday until Monday for being late when she was short-handed was a belated fabrication – made after it was discovered from Escamilla's timecard that he had been a few minutes late each day the week before. (After being criticized about clocking in early, Escamilla tried to arrive close to 5 p.m.

but, as he credibly testified, he was sometimes late because of traffic or because his watch, set by the telephone, did not show the same time as the timeclock. I also credit his testimony that he was never criticized or warned about being late except once around June, when his car broke down. Furthermore, it is clear that Lillie Centeno was not concerned about Escamilla – and Jorge Saucedo – being late on July 25, because it is undisputed that Dean Diaz – who was terminated the following day – clocked in several minutes after Escamilla and Saucedo were laid off, and proceeded to work.) I further find that Lillie Centeno's claim that she refused to give Escamilla his job back because he was an unsatisfactory worker (and Centeno's claim that there was no vacancy later) are also fabrications, and that the real reason for refusing to reinstate Escamilla was his admission of what the Company previously had known or suspected, that he had signed a union authorization card and was supporting the Union at Store No. 2. (From their demeanor on the stand, both head cashiers Oralia Magana and Ernestina Padilla impressed me as untrustworthy witnesses who, like security guard Gutierrez, appeared to let their loyalty to the Company overshadow their obligation to be candid witnesses. On the other hand Escamilla, whose credibility the Company made a major effort at the trial and in its brief to destroy, impressed me as an honest witness, [11] and an alert person, with a good memory. He is a high school junior, who makes "straight A's," is a member of the National Honor Society, and is historian for the Science Club. In crediting his testimony, I note that when he applied for another job after being terminated, he gave on the application the Company's reduction of his hours – when the new minimum wage went into effect on May 1 – and did not reveal any controversy over whether he quit or was laid off or discharged as his reason for leaving the Company.)

[11] [11]

Accordingly I find that the Company discriminatorily discharged Escamilla on July 25 because of its knowledge or suspicion that he was supporting the Union's organizational drive at Store No. 2, and that it discriminatorily refused to reinstate him because of the knowledge (from his admission) that he had signed a union card, in violation of Section 8(a)(3) and (1) of the Act.

3. Dean Diaz

On July 26, the day after she terminated Enrique Escamilla, Lillie Centeno discharged Dean Diaz, who was the leading employee organizer for the Union. He had signed a union authorization card on the Store No. 2 parking lot during work on June 28, almost a month before the Union's active organizing campaign at the three stores. Meanwhile, at the request of the union representative, he attempted to pass out cards at Store No. 2, "but most of the people wouldn't agree with me." He also attended the Union's July 24 evening meeting in the parking lot; was talking to Escamilla and Saucedo before their July 25 termination; and immediately after their termination, he went inside the store with them (within the view of Lillie Centeno) to make the telephone call to the union representative before clocking in.

On the evening of that same day, Thursday, July 25, there was an indication that President Centeno suspected or was aware of Diaz' union activity, when Centeno came to Store No. 2 for a meeting of the stockers, and specifically invited Diaz to the meeting. Diaz was then working in the bakery, cleaning some large pans. Centeno pointed to him and said, "I want to talk to you too, Dean." It was at that point (as Diaz credibly testified) that Centeno told the employees, "I know

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that most of you heard that there are some people around the store trying to organize a union." Then taking out a union card, Centeno said, "I know that most of you have seen this card," and cautioned them to be careful about what they signed.

The following afternoon, July 26, about 5 p.m., Diaz clocked in and went over to a checkout counter to begin his duties as sacker and carry-out boy. The checker, Yolanda Mata (which whom Escamilla had been talking before 5 p.m. the day before) asked Diaz, "What's going on? How come so sad?" Diaz responded, "Go ahead and do your work. Mind your own business." Diaz proceeded with his work. However, he then heard over the loudspeaker that he should report to the office, where Lillie Centeno told him, "I'm going to have to let you go. We will call you when we need you." He said, "Okay. All right," and went toward the timeclock, where Lillie told him, "Give me your card. Don't punch out." He said, "Okay," gave her the card, and left. She did not say why she was letting him go.

[12] Until the trial, there was no doubt that Diaz (like Dolores Mireles, who had been discharged purportedly for talking 2 days earlier – at Centeno's direction or with his approval) was discharged from his employment. The complaint which issued on September 25 alleged that Diaz was discharged from Store No. 2 on July 26, and the Company's October 2 answer specifically admitted the allegation. However at the trial, the Company shifted its position after Lillie Centeno gave much conflicting testimony.

On direct examination, Lillie Centeno first testified that as soon as Diaz checked in, he went to talk to the checker, and "I told him *to leave and to come back when he would stop*

talking to the checkers." (Emphasis supplied.) Shortly thereafter, she testified, "I just told him *to leave* because I didn't want him talking to the checker and that he just had to stop doing that *and not to return to work until Monday.*" (Emphasis supplied.) She then testified that he did not come back, although she had told "One of the employees, and I can't recall who . . . to tell Dean that for him to report to me Monday because Dean . . . had a habit of just running off. He wouldn't even let me explain to him, you know." Thereupon she gave this version: "I just caught him talking to the checker and I told him 'Dean, I don't want you talking to the checker and you *leave until you stop talking to the checkers. You can return to work.*' That's all I said to him." (Emphasis supplied.) She claimed that she told one of the boys that night to have him return on Monday.

On cross-examination, Lillie Centeno testified, "I have never fired Dean," and claimed that Diaz "didn't let me finish telling him to come back Monday." She first denied that she had Diaz' telephone number, then claimed that she did not know if she had it, and next admitted, "I guess we do have it in the record and his health card." She then denied that she *ever* made any effort to contact him other than through the package boy. However she later testified, "If I recall, I might have even told Dean himself to come back but I can't remember too well." She testified that she thought that she told him to come back, but "He didn't say nothing. He just smiled." Still later she claimed "I think I even told his little girl friend. . . . I'm not certain but I am pretty sure I had told Dean to come back himself and then I told one of the package boys to tell him before I saw Dean again." Yet later, she gave the following versions of what happened: "I just told him *to leave and not to come back.* Well, I *didn't tell him not to come back.* I said

'Leave. I don't want you talking to the checkers.' And he didn't let me finish telling him to come back to work Monday. He just turned around, took off his apron, and left. He was almost running." (Again, she did not appear to be a candid witness.)

Despite these apparent efforts to make it sound as if she was eager to have Diaz on the job, Lillie Centeno (joined by head cashier Padilla, previously found to be an untrustworthy witness) claimed that he was an unsatisfactory employee. Although he had been suspended before, and discharged once (over a year earlier, in March 1973, after being hired while in the ninth grade in November 1972), he had been rehired and was given no warning at the time of being laid off for any misconduct.

After considering all the evidence and circumstances, including the timing, President Centeno having singling him out to attend the union-inspired company meeting the evening before, and the similarity [13] between his summary termination for talking and the summary discharge of Mireles at Store No. 3 purportedly for talking 2 days earlier, I find (contrary to the denials) that the Company knew or suspected that Diaz was a union organizer or supporter, and infer that President Centeno and his sister, Lillie Centeno, had agreed that she should discharge or "lay off" Diaz upon the first pretext. I further find that that pretext came when Diaz said a few words to the checker, refusing to carry on a discussion with her. I also find that the Company's belated shift of position – from an admitted discharge to a purported suspension – was made to bolster the Company's defense, upon the realization that two summary discharges for talking, within a 2-day period during the first week of the Union's active organizing drive, would be difficult to justify.

[13] [13]

I therefore find that Diaz was discriminatorily discharged in violation of Section 8(a)(3) and (1) of the Act.

4. Anita Gonzalez

At Store No. 1, on Friday, July 26, President Centeno summarily discharged checker (or cashier) Gonzalez, an employee with 16 years of satisfactory service, after she began talking with employees about the need of contractual seniority and union protection.

By this Friday, of the first week (July 22–26) of the Union's active organizing, the Company was carrying on an antiunion campaign at the three stores – several days before the Company contacted counsel on July 30. At Store No. 1, a supervisor had observed the Union's Monday evening parking lot meeting, and on Tuesday afternoon had interrogated cardsigner Mireles, whom President Centeno and the store manager decided that Tuesday evening to terminate, as found above. At Store No. 2, Lillie Centeno (in the presence of Chairman Jose Centeno) had observed employees Escamilla and Diaz with other employees at a Wednesday evening meeting, and by agreement with President Eloy Centeno, terminated Escamilla (and another employee) on Thursday afternoon and Diaz on Friday afternoon, as also found. At Store No. 1, Chairman Centeno (as discussed below) had taken part in the antiunion campaign. Meanwhile (also as discussed later), the Company had approved substantial wage increases that week for all the employees, and on Friday evening, President Centeno held a meeting of the Store No. 3 grocery employees (including part-time sackers and stockers who had signed union cards at the Monday evening meeting) and announced the wage increases and other new benefits while discussing the Union's organizing campaign. It was in the

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context of this and other antiunion conduct on the part of the company management that week, that senior employee Gonzalez was discharged.

Chairman Jose Centeno became actively involved in the antiunion campaign on Wednesday afternoon, when he personally engaged in surveillance of a conversation between Gonzalez and International Representative Sierra. That afternoon, contrary to Jose Centeno's usual practice, he was at Store No. 1 about 3:30 in the afternoon, and had parked his car (a gold-colored Lincoln Continental) near the front of the store. (Customarily, he worked at the store 7 days a week. Daily except on Sunday, he worked in the mornings and returned to the store after lunch about 5 p.m., to work until after closing time. Through habit, he had always parked at the rear of the store.) As credibly testified by Gonzalez (and corroborated in [14] essential part by Representative Sierra's pretrial affidavit, which the Company introduced into evidence), Gonzalez met Sierra on the sidewalk near the front of the store about 3:30 p.m., during her lunch break. (Sierra had given Gonzalez a union card about 9 o'clock the evening before as she was leaving work at Store No. 1, and she telephoned him to have him meet her in front of the store at lunch.) Gonzalez gave her signed card to Sierra, who was discussing union benefits with her. Then, as they were talking and as Sierra was holding Gonzalez' union card in his hand, Chairman Jose Centeno came out, spoke, and sat in his car parked at the curb adjacent to where they were standing on the sidewalk. Jose Centeno sat there, looking at Gonzalez and listening to the conversation. (Sierra and the employees were standing next to the front bumper of the car, and Jose Centeno was seated in the front seat, a few feet away, easily within hearing distance.) Gonzalez spoke up, telling Sierra that she had signed the card

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and now it was up to the other employees, and asking if the Union would protect them. Sierra said that they had the right to work under a union, and "to remember the date," July 24, because "It could be that you need it." Shortly thereafter, as Jose Centeno was still watching from his car, Gonzalez returned to work. Jose Centeno came back inside the store, and Gonzalez observed him *talking* with his son, President Eloy Centeno, near the front door. When called to the stand, Jose Centeno (age 76) denied on direct examination that he ever saw Sierra talking with Anita Gonzalez, and that he ever knew if she was ever active with the Union or whether she signed a union card. However on cross-examination, he testified, "I heard that when Anita was *in there* . . . that Anita bring something and they sign there . . . Some of the clerks there said that Anita is signing a paper with the Union." (Emphasis supplied.) Although he added, "But I never even go to the front," and that he told the employees reporting to him that he did not care himself, I find that he was aware that Gonzalez was supporting the Union at the store on that Wednesday, and discredit his denials. (The evidence does not reveal the identity of these employees who reported Gonzalez' union activity to Jose Centeno, or whether they reported to him that Gonzalez was talking to a union representative after work on Tuesday evening, and/or was talking to employees about the Union before, during, or after her lunch break on Wednesday afternoon.) From all the circumstances, including the fact that Jose Centeno was at the store at 3:30 p.m. and parked near the front of the store (contrary to his usual practice), I infer that he had learned about the union activity at Store No. 1 (whether it was the presence of one or more union representatives outside the store at closing time on Tuesday evening, or union activity inside the store on Wednesday morning), and was concerned enough about it to forego his customary long lunch break. I note that even though

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Jose Centeno *admitted* talking to Eloy Centeno about the Union, President Eloy Centeno positively *denied* that his father ever mentioned the Union to him. President Centeno also denied that Jose Centeno ever told him that Jose had seen Sierra talking with Gonzalez, and denied that Jose ever told him anything about Gonzalez having anything to do with the Union. Early in Eloy Centeno's direct examination, he denied that he even knew about the Union organizing at this Store No. 1 until the following Tuesday, July 30, when Representative Sierra tried to get him to rehire Gonzalez. I discredit these denials as well. (From their demeanor on the stand, both Chairman Jose Centeno and President Eloy Centeno appeared to be less than candid when making the denials.)

[15] The next day, Thursday, July 25, was Gonzalez' scheduled day off. On Friday, President Centeno called her to the office and as she credibly testified, "said that he was going to let me go . . . because I was telling the workers that I had 16 years working there" (and no seniority). She asked if she had made any errors or committed any mistakes in her work, and Centeno "said he didn't have anything to say about my work." She then admitted to him that she had been talking to the employees, telling them that she wanted the Union to come in, and citing herself as an example. "I told him that I had told the workers that we should get together to . . . have a union." (The Store No. 1 employees to whom she had talked about the Union included checkers Irma Guahardo and Violeta Valdez, and sackers Rudy Cortinas and Ricardo Martinez.) Gonzalez then told him about various grievances she had had over the years, including recently being transferred to the evening shift, despite her seniority. She apparently was quite upset, but she denied that she talked in a loud voice, testifying "that's how I speak usually." She credibly testified that

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Centeno did not tell her she had a bad attitude toward him or the Company, and that he did not ask her to change her attitude. I note that Chairman Jose Centeno admitted that she was a *good employee*, and that President Eloy Centeno testified that she was a *good, accurate, punctual checker*, and that the quality of her work was good. However, Eloy Centeno claimed she had a bad attitude "pretty close" to the entire 16 years she worked there, but that he had never talked to her about it, and that it did not really bother him.

According to President Centeno, he did not call her in and tell her she was fired, and did not tell her he had heard that she had been telling employees she had been there 17 years and had no seniority. Instead, he claimed, "I asked her what seemed to be the problem, and she got into a real tirade, hollering at me and telling me how unjust I had been . . . And I asked her if she was willing to change her attitude toward the store and me, and she says no, and I said, "Well, do you want to resign?" and she said, 'No. You'll have to fire me' . . . in a real high-pitched tone. And . . . I told her, 'Then I'll have to fire you.' And I fired her." He denied knowing anything about her union activity. He also claimed that although he did not mention it to her, and did not intend to discharge her when he called her into the office, a route salesman and customer had reported to him the day before that on Wednesday, Gonzalez had been "bad-mouthing" Centeno and the store, using vile language. (The Company in its brief describes this route salesman and his wife as "disinterested witnesses," who should be credited. However, I do not consider them completely disinterested, in view of their friendship with Centeno – attending his "parties at the ranch and different places like that" and "Christmas parties and Easter and stuff like that" – and because of the husband's weekly commission of about $125 or $130 on bread

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he sells to Centeno. Gonzalez did not recall seeing that couple in the store on that Wednesday, and she credibly testified that she never used such language. Moreover, the couple's testimony was so extreme and embellished – claiming that Gonzalez included the Spanish expression for "waddling in s- -t," was grinding her teeth, "with a lot of malice in her heart," causing them to be "scared for Eloy" – that their testimony impressed me as being contrived. In view of the facts that (a) this testimony was not convincing, (b) the purportedly threatening language was admittedly not reported to Centeno at the time – but purportedly a day later, (c) it was not overheard by any other [16] witness, (d) Gonzalez is not accused of ever using such language, or cursing Centeno or the store, at any time before in almost 17 years of service, and (e) Centeno did not even mention it at the time of Gonzalez' discharge, I find that the incident was a belated fabrication, to conceal Centeno's real reason for calling her into the office. (I note, but find it unnecessary to rely upon, the TEC appeals referee's favorable ruling on Gonzalez' claim for unemployment compensation, and his finding, "it is my opinion that the evidence does not support the conclusion that the claimant made the remarks in question.") In crediting Gonzalez' account of what happened, I have considered the testimony of checker Enriqueta Vasquez, a company witness who authorizes checks in the absence of the store manager. She testified that Gonzalez was *smiling* when she was called into Centeno's office, and stated that she was going "to tell him everything I feel." Vasquez testified that she never heard Gonzalez make any derogatory remarks about Eloy Centeno or any of the Centeno family. I have also considered the testimony of General Manager Williamson, who claimed that he heard a "pretty loud" woman's voice in Centeno's office, and that Centeno later commented that Gonzalez "sure got emotional" and that he "had to fire her."

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(Williamson's credibility is discussed later.) In addition, I note the testimony by another company witness, Grocery Store Manager Richard Benavidez (at Store No. 1), that firing a person "is not the way Centeno handles" such problems. "They don't usually fire people. . . . I don't recall nobody that we have fired except this lady," Gonzalez.

Having credited Gonzalez' testimony and having considered all the evidence and circumstances, including Chairman Jose Centeno's admission that Gonzalez' union activity in Store No. 1 had been reported to him by other employees, his watching and listening to her conversation with the union representative on the last workday before her discharge, and his being observed talking in the store to President Eloy Centeno immediately after his surveillance of her, I find (contrary to the denials) that the Company was aware of her union activity and, as argued by the General Counsel in its brief, terminated her – as it did Escamilla and Diaz at Store No. 2 and Mireles at Store No. 3 that same week – as "part of Respondent's overall efforts to frustrate the Union's attempts to organize the employees."

Accordingly, I find that the Company discriminatorily discharged Mrs. Gonzalez, after nearly 17 years of satisfactory service, in violation of Section 8(a)(3) and (1) of the Act.

5. August 17 terminations

The foregoing discrminatory discharges at Stores Nos. 1, 2 and 3, occurring before the Company retained counsel, were – despite the Company's vigorous defense – rather crudely carried out. However, the termination of six union supporters at Store No. 3 on August 17, accompanied by an intra-company

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letter of explanation dated the day before, was carried out in a more sophisticated manner. Yet, a careful analysis of the evidence reveals the same discriminatory motivation.

[17] The evidence reveals that the Company was particularly concerned over the union support at Store No. 3. The initial union meeting was held at this store on Monday evening, July 22. The meeting was well attended by employees (mostly sackers and stockers) from the grocery department, and union cards were being signed – within the view of Assistant Grocery Manager Jaramillo – who was watching from inside the door. The next day, Jaramillo interrogated two of the cardsigners (Mireles, who was discharged Wednesday morning, and produce stocker Hector Garcia, discussed later). A large number of cards were signed that Monday evening, but only two of the cardsigners (both girls) had mentioned canceling their cards. On Friday of that week, as discussed below, President Centeno held a *special meeting of grocery employees* at *only* this one store, and announced substantial wage increases and new benefits, along with a caution about what they signed (referring to the union cards). On August 1, the Company's counsel met with supervisors at Store No. 3 (but not at the other two stores) and gave them instructions for carrying on an antiunion campaign. Later Centeno, shortly before the August 17 terminations, raised the subject of the Union with Store No. 3 stocker Garcia; and told him, "I've heard you're all for the Union"; and indicated a connection between eliminating sackers and the Union coming in. As discussed more fully below, Centeno told Garcia, "If we let the Union come in . . . the cashiers, the girls, would probably have to be doing their own sacking." Then about 2 weeks after the August 17 terminations, both Centeno and his sister, Lillie, mentioned the Store No. 3 terminations to Escamilla (who had been discharged at Store No. 2 and who was

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seeking his job back). On August 29 as Escamilla testified, he asked Lillie Centeno for his job back (at a time when work was slow on his interim job), and she asked him if he had heard about the layoffs at Store No. 3. "She told me they had been laid off because they were going to school and that Eloy didn't want to keep any students there working." This conversation was followed a few days later by a conversation between Escamilla and President Centeno on September 3, when Centeno admittedly told Escamilla he could not be rehired because of a new no-rehire-for-6-months policy. At that time, as Escamilla credibly testified, Centeno explained "that he could not take me in because of this new policy . . . and that if he would take me in, he was going to have to take all the people in . . . that had been laid off." This reference was later clarified by the company counsel upon cross-examination of Escamilla, when the counsel asked him (over the General Counsel's hearsay objection) what Escamilla's mother told Escamilla after she herself talked to President Centeno on September 5. "She told me that [Centeno] said he couldn't hire me because if he had to, he would have to hire all the people he had laid off" – referring to the part-time employees laid off at Store No. 3 on August 17. (I note that it was only 1 day later when, as Centeno testified, he went to Store No. 3, found that "we were quite busy," and decided to recall three of the students.)

On August 17, at Store No. 3, the Company had 13 part-time employees, only 11 of whom are identified in the record: Segundo Arguello, Mike Esquivel, Jesse Flores, Hector Garcia, Salvador Garza, Charlie Hernandez, Raul Herrera, Joe Lopez, Mark Martinez, John Mata, and Johnny Ramos. (Five of the six alleged discriminatees – Arguello, Flores, Herrera, Lopez, and Ramos – had attended the July 22 meeting and had signed

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union authorization cards. The other one – Martinez – had signed a union card and had been observed, by Assistant Grocery Manager Jaramillo, [18] talking to a union representative when Martinez left work early one evening.) Although all 13 of the part-time employees worked as sackers if and when required, 3 of them (Esquivel, Hernandez, and Lopez) were being trained as checkers; and at least 4 (Garcia, Herrera, Martinez, and Ramos) regularly worked as stockers. Checker-trainee Lopez also did stocking on Sundays, and all of the other part-time employees also did stocking, with the exception of Mata (the last employed) and two others, unidentified. Thus, among the 13 part-time employees, 3 worked solely as sackers (who also brought in carts and did odd jobs); 10 worked as stockers either regularly or part of the time; and 3 of those who did some stocking were being trained as checkers (or cashiers). The six alleged discriminatees included checker-trainee Lopez and stockers Herrera, Martinez, and Ramos.

For months, the Company had been unable to hire and retain enough checkers at Store No. 3. As revealed by General Manager Williamson, the Company decided in March to increase the number of checkers from 12 to 20 (a minimum of 18 being required), and during the months of March, April, and May, hired a total of 18 additional checkers. However, by June 4, 16 checkers had quit, leaving only 14 checkers at Store No. 3. The Company continued its efforts to employ more checkers, but between June and the end of the year, the number of checkers on the payroll remained only 14 or 15.

It was under these circumstances (the greatest union support among the Store No. 3 sackers and stockers, part-time employees doing much of the stocking and also training to be checkers, and a shortage of checkers) that the Company

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prepared the August 16 letter to the store managers and followed a procedure which resulted in the sudden termination of 10 part-time employees at Store No. 3 but *no* terminations at Store 1 and 2, where there was less union support.

The August 16 letter, signed by General Manager Williamson and addressed, "Attention Store Manager," stated:

> For your information, we are changing our policy pertaining to stocking our stores. Effective August 31st, 1974, we will begin *night* stocking. We have been *working on this program for several months*. . . .
>
> Another policy change to take effect August 19th, 1974 is the *phasing out of package boys*. On this date we will *no longer use part-time package help*. The *checker will check and package*. . . .
>
> We will start this program *at Store No. 3 on August 19th, 1974, on August 26th at Store No. 2*, and the following week, *September 2nd, at Store No. 1*. (Emphasis supplied.)

Before proceeding, I find that this letter was evidently prepared as a defense to any future charge of discrimination, rather than being a regular intra-company communication. The evidence clearly shows that the statement, "We have been working on this [night stocking] program for several months," was false. Only one stocker, at Store No. 1, had suggested night stocking (i.e., stocking the shelves after midnight), and nothing had been done to determine its feasibility at the three stores until a week or so *after* the August 16 letter, when that stocker was assigned to explore the idea with other stockers, who immediately rejected [19] the idea. The night-stocking policy change was then dropped. Moreover, the evidence discloses a discriminatory

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motivation for making the sacker-phasing-out policy effective earlier at Store No. 3 than at the other two stores. School was scheduled to begin during the week of August 19. The Company expected to lose some of the part-time employees through attrition (when they returned to school) – as happened particularly at Store No. 2, where seven or eight students quit. However, by announcing the change to the store managers on the preceding Friday, August 16, and making the policy effective immediately at Store No. 3 and suddenly terminating 10 of the students there (without waiting to see which ones might be quitting to return to school), the Company was able to eliminate a number of known or suspected union supporters and to undercut the momentum of the union organizing drive there. (No employees were thereafter laid off at Stores Nos. 1 and 2.) Moreover, there was never any intention to eliminate all the part-time sackers. At one point on direct examination, President Centeno positively answered, "No," when asked if he ever made a decision to phase those sack boys out at Store No. 1. Then, after a pause, Centeno changed his answer (apparently recalling this August 16 letter to the contrary). Thereupon he answered, "Well, we actually had worked on it and we were going to try to phase out Store 3 and 2, then 1, but we decided not to do it at Store No. 1." He failed to concede, at that point, that the Company continued to employ part-time student sackers at all three stores.

President Centeno (with General Manager Williamson) personally went to Store No. 3 on Saturday evening, August 17, and terminated most of the part-time employees – without any prior warning. Grocery Manager Armando Cortez was absent and the action came as a surprise to Assistant Grocery Manager Jaramillo, the employees' immediate supervisor. (At the trial, Jaramillo testified that he did not know why the approximately

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10 "package boys" were "let go.") Centeno called 12 of the 13 part-time employees to the meeting. (Although stocker Garcia was a part-time employee who planned to continue going to school, he was not invited to the meeting and was not discharged. The Company apparently had no one to replace him as produce stocker, and he had equivocated in his union support when Centeno had recently interrogated him.)

According to President Centeno, they asked the part-time employees, "How many are going to school?" Ten of the 12 (all except Esquivel and Hernandez) raised their hands, and "I told them that their employment was going to be terminated, and I gave them the reasons that we were going to go into night stocking and that they were going to go back to school, and I wouldn't have any use for them." He also told them that the cashiers "were going to do their own sacking." When asked by company counsel why he was concerned about them going back to school, he answered, "I wanted them to go back to school. I wanted them to learn." (He had employed students during previous school years, and he continued to do so thereafter.)

On direct examination, President Centeno gave these reasons for deciding to terminate the 10 "sack boys": (a) "We were phasing out the package boys." (b) "School was getting ready to reopen." (c) "I had made mention to [Grocery Manager] Cortez on several occasions . . . That we needed more checkers." (He denied that the Union had anything to do with the decision.) Concerning (a), the Company continued to use

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sackers at all three stores. At Store No. 3, as credibly testified by Joe Lopez (one of the students who was training to be a checker before Centeno terminated him on August 17), Lopez visited the store early one evening about 3 weeks later

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and saw new sackers (about his age, 18 years old) who were "sacking and bringing in baskets." In addition to hiring these new employees, the Company recalled three of the terminated employees on September 6. Concerning (b), the Company does not deny that it regularly employs school students to work part time. Several of those terminated had been employed at Store No. 3 during the previous school year. Concern (c), it is true that the Company was seeking – but unsuccessfully – to hire enough checkers. Thus the Company was terminating sackers (as well as stockers and one checker-trainee), on the pretext of assigning the sacking work to checkers, when for months, the Company had failed in its efforts to increase its staff of checkers and was operating short-handed (with 14 or 15 checkers, instead of 18 or 20).

As the direct examination progressed, President Centeno claimed that (d) there were too many sackers employed at Store No. 3. He claimed that in May or June, he went to the store, found a shortage of checkers (only three checkers, when there are 12 checkout stands), and saw six to eight sackers just "standing around." (On cross-examination, he added that when he found too many sack boys at Store No. 3 in June, he told Cortez "we were going to have to *start laying these boys off* [emphasis supplied].") There is no question that there was a shortage of checkers, but I discredit his claim that there were too many sackers, standing idle, in *May or June*. The Company continued to hire sackers *through July 8*, when Mata was hired, and Assistant Grocery Manager Jaramillo positively testified that there was always something for the package boys to do, and that he kept them busy. (I note that when Mata was called as a defense witness and was questioned about what Centeno told the part-time employees on August 17, the company counsel asked Mata the leading question, "Did he say anything

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about having too many sack boys?" After an objection, for leading, Mata answered that Centeno said "there were too many sack boys and he would have to get rid of some of them, and he would start with the ones that went to school." Then, in response to the next question, he changed his testimony and denied that Centeno said there were too many sack boys. He appeared to be attempting to concoct testimony which would benefit the Company. I also note that General Manager Williamson claimed that Store No. 3 "had too many boys messing around not doing anything." However, he admitted that although he visited the store that summer, he never said anything to Grocery Manager Cortez about the number of package boys and did not tell him to get rid of any of them.) Returning to Centeno's testimony, I also discredit, as a fabrication, his claim that about the middle of July, he told Manager Cortez (who did not testify) that "we were going to get rid of these sack boys, and for him to get more checkers, and as soon as school started, we were going to let" the sack boys go. By that time, the Company had already been attempting for months to increase the staff of checkers to 20, but had failed. And if Centeno had actually made such a statement to Cortez about terminating sackers, undoubtedly Cortez would have notified the employees' immediate supervisor, Jaramillo, who testified that Cortez never told him anything about firing the package boys. In addition, I note that Centeno claimed that his reason for waiting from July until August to terminate the sack boys was "I didn't want to terminate them because they couldn't get employment anywhere [21] else." I find this to be an afterthought, in view of his above-mentioned claim that he told Cortez in June "we were going to have to start laying these boys off"; the fact that these employees (who were not told when hired that the work would be temporary) were not given any prior notice of termination; the indication of a

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need of continued employment for some of the students to remain in school; and General Manager Williamson's subsequent testimony about economizing.

Thereafter, President Centeno gave his next purported reason for the terminations, (e), night stocking. He claimed that the decision had been made "in June or July . . . I can't pinpoint the date" to go to night stocking. When next asked about when he decided to go to night stocking, he answered, "We decided to go to night stocking after the new minimum wage and hour law went into effect [in May], and we were going to institute it in September. I think it was in September that we were going to institute it." (I find that this is also a fabrication.) When asked on cross-examination if he had decided to go to night stocking back in May, he positively answered, "Yes," before the company counsel objected that words were being put in the witness' mouth. Thereupon Centeno was asked what was decided in May, and he testified that stocker Tirso Cano then suggested night stocking, and "I said we would look into it." Thereafter, about the second week in *August*, "we decided we were going to go into night stocking," and terminated the boys. "Then [about a "week or so" *after* the August 17 terminations] I asked the same Tirso Cano to make a survey to see how many boys we could get to work on night stocking. He came back and he said he took a poll and the boys didn't want to work." (I note that although this was the first time Cano had polled the stockers about working the midnight shift, General Manager Williamson repeatedly testified that Cano reported back "that the boys had *changed their minds* [emphasis supplied]" and "didn't want to stock at night." I find that this testimony, about the stockers "changing their minds," was a fabrication, and note that Williamson finally testified that he did not believe he was present when Cano reported back to

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Centeno.) Thus, the decision to go to night stocking was not made until August, just before the Company used night stocking as a reason for summarily discharging the part-time employees; and the Company took no action to determine if the full-time stockers would work the midnight shift until several days afterwards. Thereupon the poll of stockers was made and the idea was dropped. However by that time, the part-time employees had been eliminating. Then, instead of recalling those who had regularly worked as stockers (Herrera, Martinez, and Ramos), or a stocker who had also been training as a needed checker (Lopez), the Company recalled the newest employee, sacker Mata (who testified upon the Company's behalf), and assigned him to stocking for the first time. (The record does not disclose the qualifications of the two other students who were also recalled on September 6.)

After President Centeno's purported reasons for terminating the part-time employees were severely shaken, the Company called General Manager Williamson as a witness. He added another purported justification, (f), cutting costs. He claimed that "we had been working on the pay scale, making the new pay scale going into effect the last of July or as soon as we could get the computer going, and we needed to cut some costs." Earlier, he had testified about the problem of long checkout lines at Store No. 3, because of the shortage of checkers. Thus, according to his [22] reasoning, there were long checkout lines because of a shortage of checkers; therefore, 3 weeks after the Company granted a wage increase, it decided to terminate the sackers (as well as stockers and a checker trainee), and add the sacking duties to those of the checkers, in order to economize – further slowing up the checkout lines. I do not deem this very persuasive. (I also discredit his claim that the "principal job" of these part-time employees – whom

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he called "sack boys" – was to bring in carts off the parking lot and sack when they weren't busy doing that, or sweep.)

The General Counsel contends that the Company terminated the six students "for no other reason other than that it knew these boys were actively supporting the union movement and the record and evidence is clear that the reasons given to the boys for their termination were clearly pretextuous and without any genuine basis whatsoever." The Company contends in its brief that the Store No. 3 "sackboys" who were returning to school were terminated because of the decision "to phase out sackboys at that store as well as the other stores and revert to the former policy (previously in effect at Store 3) of having checkers check and sack groceries" – referring to when the store opened in November 1972, when they hired "Sack ladies" to do the sacking and learn to check – and that "This was part of an economic move resulting from the wage increases that they were granted in July and the fact that there were too many sackboys and not enough checkers." The Company further argues that there is no evidence of its awareness of the sackboys' union activities and no evidence that they engaged in any union activities other than signing union cards during the month of July. Ignoring the evidence that at least four of the six alleged discriminatees regularly did stocking (and one of the four, Lopez, was also being trained as a checker), the Company also argues that "the only reason the sackboys were told about night stocking was to show them that Respondent had thought of placing some of them in other jobs with the Company, possibly as stock boys, but was unable to do so because of its plan to go to night stocking."

Because of the foregoing analysis of the evidence, and a careful consideration of all the evidence and circumstances,

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including the Company's shifting defenses, I find that the Company's arguments are not supported by the evidence, and agree with the General Counsel that the purported reasons for the terminations are clearly pretextual.

I find that the Company was determined to defeat the Union's organizational drive in Store No. 3, where the Union's support was the greatest, and that the summary discharge of the six alleged discriminatees (at the same time the Company discharged four others who did not file charges) was clearly discriminatorily motivated. Accordingly, I find that the August 17 discharge of Segundo Arguello, Jesse Flores, Raul Herrera, Joe Lopez, Mark Martinez, and Johnny Ramos violated Section 8(a)(3) and (1) of the Act.

C. *Alleged Coercion and Interference*

1. Granting benefits and wage increases

On Friday, July 26 (the 5th day of the Union's active organizational campaign), President Centeno and General Manager Williamson [23] held a meeting of grocery employees after work at Store No. 3 and announced a new benefits program which the Company was working on. As stocker Garcia credibly testified, Centeno announced, "Right now we're getting together . . . forming this policy that will bring our employees better benefits," and specifically named increased wages, paid holidays, etc. (As recalled by stocker Herrera, Centeno stated "they were making a new" policy "that was going to have better benefits." As recalled by checker-trainee Lopez, Centeno stated he wanted to talk "about a policy that I'm coming out with." Sacker Mata, a company witness, recalled that Centeno said "they were working on some pamphlets or something.")

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Then, after discussing the new benefits program, Centeno took a union authorization card from his pocket, showed it to the employees, and began cautioning them about what they signed, as discussed below. (This was the only store at which Centeno held such a meeting.)

By the following Monday, July 29, the Company finished the drafting of the new benefits policy, and posted it in the three stores in typewritten form, bearing the date of July 29. (This was the first time the Company had placed its benefits program in writing.) Over a month later, on August 31, the Company distributed the new benefits policy in printed form to the employees. It, like the typed copy, contained admittedly new benefits: a second week of vacation after 3 years, five paid holidays, paid sick leave, and 15-minute paid work breaks. Meanwhile, on August 3, the Company granted substantial wage increases to the employees, effective for the pay period of July 24–30.

Thus at Store No. 3, where the Union had received the greatest support, President Centeno personally announced the preparation of a new benefits policy, and connected the announcement with the union organizational drive by cautioning the employees about what they sign. On the fact of it, the granting of the new benefits (shortly before the Company retained counsel) were "calculated to thwart the employees' organizational efforts," as argued by the General Counsel. However, the Company now contends that the increased wages and new benefits had nothing to do with the Union, but had long been planned to be instituted when the Company's new computer was placed into operation. I find this defense to be an afterthought.

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The Company had been notified on April 26 that the computer was scheduled to be shipped on July 5: 24 days before the benefits program was finally completed in typed form. (I discredit, as a fabrication, General Manager Williamson's testimony that "somewhere in the neighborhood of the middle of July . . . the proofs [for the printed brochure, which was distributed on *August 31*] came back to us for the final proofing and ready to print.") I find that the typed pamphlet was hurriedly compiled, to include the new benefits, during the first week of the Union's active organizational drive, and immediately announced to the group of employees who had indicated the most support for the Union. Concerning the wage increases, I note that at one point, President Centeno positively testified that in May (when the $2 minimum wage went into effect and the higher-paid employees were dissatisfied with their 5 cents to 10 cents increase), he told them that a new program would go into effect "As soon as our computer got there." This testimony is contrary to the testimony of other witnesses, and also contrary to Centeno's own subsequent testimony when he admitted on cross-examination that he told [24] employees merely that the Company was "working on" the wage inequity problem, and did *not* promise them a date. (I therefore discredit Centeno's claim that he told employees that they would be given a wage increase as soon as the computer arrived.) I note that General Manager Williamson testified that the May rates raised "our salary percent substantially," and "we had to get rid of some people" and "work into a program of getting things down to where we would be able to live with them," before giving any new raises. He admitted that nobody had been eliminated before August 1 pursuant to the program of reducing labor costs, and finally admitted that it was *5 or 6 days before* the computer actually printed the new paychecks on July 31 or August 1 (that is, during the *latter* part of the

[24] [24]

first week of the union organizing) that Centeno approved the wage increases. (I discredit his later attempted retraction, in which he claimed that Centeno approved the new wage increases "roughly around the 19th to the 20th – i.e., a day or 2 *before* the Union began organizing. As before, he did not appear to be a candid witness.)

Accordingly I find that the Company gave the employees the wage increases and the new benefits soon after the Union began its active organizing campaign in order to interfere with the employees' Section 7 rights, in violation of Section 8(a)(1) of the Act.

2. No-solicitation policy

In the hurriedly prepared benefits pamphlet, entitled "Bienvenido a Centeno," dated July 29, the Company included a no-solicitation policy applicable to nonemployees: "Persons who are not employees may not solicit or distribute literature on this company's property for any purpose whatsoever."

Although I discredit President Centeno's testimony that the Union had nothing to do with the adoption of this no-solicitation rule on July 29 (and note his testimony at another point that "No, not primarily," did he adopt the rule in order to keep the Union away), I agree with the Company that the General Counsel has not established by a preponderance of the evidence either that the Union did not have adequate alternative means of access to the employees or that the rule was discriminatorily enforced after July 29. (Evidence clearly shows that the Company did not sanction or encourage the "hit and run" tactics of little boys who would occasionally, and briefly, distribute "spiritualist" leaflets in front of the stores. The

[24] [25]

preponderance of the evidence also shows that the political campaigning on company property was discontinued after July 29.) I therefore dismiss the complaint insofar as it alleges that the no-solicitation rule was unlawfully instituted, and that it was discriminatorily enforced by requiring the after-work union meetings to be held on the sidewalks or elsewhere and not on the Company's parking lots.

3. Interrogation, threat, and surveillance

The consolidated complaints allege that on July 25 (before the Company consulted counsel), Lillie Centeno unlawfully interrogated an employee (discriminatee Escamilla); and on September 3 (when there was no indication that Escamilla would join other discharged employees in filing [25] charges against the Company), President Eloy Centeno unlawfully interrogated him. As previously found, Escamilla told Lillie Centeno on Wednesday evening, July 25, that he quit, after he had been discriminatorily "laid off" (discharged) earlier that afternoon. After 9 p.m. that evening, as he credibly testified, he asked Lillie Centeno for his job back, and she asked him, "Did you sign a union card?" and after he admitted it, she asked "Why did you sign it?" She said she would talk to Eloy and tell him everything Escamilla had told her, and "If he says he will take you back, I will take you back." Thereafter on September 3, as Escamilla credibly testified, President Centeno asked him, "Did you sign a union card?" and why, and later in the conversation, as previously found, discussed the Union with him and said that Escamilla should have gotten his card back and torn it up. I find that the interrogation, both by Lillie and Eloy Centeno, was clearly coercive, in view of his discriminatory discharge and his efforts to regain his employment. I therefore find that the interrogation violated Section 8(a)(1) of

[25] [25]

the Act. I also find that when President Centeno told Escamilla in the same September 3 conversation, that Centeno could not take him back until 6 months after his termination, because "if he would take me in, he was going to have to take" back all the Store No. 3 part-time employees (who, as previously found, were discriminatorily discharged on August 17), the Company further engaged in coercive conduct, in violation of the Section 8(a)(1) of the Act. (I make this finding, despite the fact that 3 days later, when the Company found a serious shortage of sackers and stockers at Store No. 3, it did recall three of the discriminatorily discharged Store No. 3 part-time employees.)

The complaints also allege that on July 25 at Store No. 2 and on July 26 at Store No. 3, President Centeno unlawfully interrogated employees (in meetings with them). However, the credible evidence fails to prove that Centeno interrogated the employees about their union support on either occasion. At Store No. 2, as discriminatee Diaz credibly testified, Centeno met with the stockers and merely said he had heard that there were some people around the store trying to organize a union and then, pulling out a union card, said that some of the employees may have seen such a card, and cautioned them to be sure what they did and what they signed. At Store No. 3, the following evening, Centeno talked to the whole group of grocery employees, and went more into detail in discussing the union organizational drive (after talking at length about the new benefits and wage increases the Company was preparing to give them). I discredit the testimony by discriminatees Herrera, Martinez, and Ramos that Centeno asked the employees if any of them had signed such a union card. I therefore find that the Company did not unlawfully interrogate any of the employees at either the July 25 or 26 meeting. I also find that Centeno did not unlawfully create the impression of

[25] [26]

surveillance at the July 26 meeting by referring to the Union's organizational efforts and to the employees signing union cards.

The complaints further allege that about August 15 (2 days before the Company discriminatorily discharged 10 part-time employees, telling them that the checkers would be doing their own sacking of groceries), President Centeno threatened "that if there was a union, there would be less employees employed and there would be a reduction of employee working hours." Produce stocker Garcia credibly testified that after work one evening, when he was talking the second time with Centeno [26] about another part-time employee getting a larger increase in pay (evidently a computer error), Centeno mentioned the union organizational campaign and said, "If we let the Union come in, that would have to mean stricter policies . . . like less employees, less hours for each employee; and the cashiers, the girls, would probably have to be doing their own sacking." In view of the discriminatory discharge of 10 employees a few days later, I find that this statement by Centeno was coercive and violated Section 8(a)(1) of the Act.

As previously discussed, Store No. 3 Assistant Grocery Manager Jaramillo asked discriminatee Mireles on July 23 if she had signed a union card "they handed to you" the evening before at the parking-lot union meeting, and when she admitted that she did, he asked her why. Later that afternoon, as produce stocker Garcia credibly testified, Jaramillo went to the warehouse were Garcia was working and asked him what was going on the night before. Garcia answered that some union representatives were explaining about what the Union was and handing out union cards to be signed. Jaramillo then asked if Garcia had signed one of the cards, and Garcia admitted doing so. In view of Mireles' summary, pretextual discharge the very next

[26] [26]

morning, I find that Jaramillo's interrogation of her and Garcia on July 23 was coercive and violated Section 8(a)(1) of the Act.

The complaints allege that Assistant Grocery Manager Jaramillo's observation of the union meeting on the Store No. 3 parking lot on July 22 was unlawful surveillance. However, in view of the fact that Jaramillo remained inside the store, watching a group of employees openly assembled in clear sight on the Company's parking lot, I find that his conduct was not coercive and did not violate Section 8(a)(1) of the Act. However, I find that Chairman Jose Centeno's conduct at Store No. 1, 2 days later – going outside the store, sitting in his car parked immediately in front of where Union Representative Sierra was talking to employees (including discriminatee Gonzalez) on the sidewalk, and watching Gonzalez while listening to the discussion about the Union – was coercive, in view of Jose Centeno's being observed immediately thereafter talking to his son, President Eloy Centeno, and President Centeno's summary discharge of Gonzalez on her next workday. I therefore find that Chairman Centeno unlawfully "engaged in surveillance of employees as they discussed union activities with a representative of the Union," as alleged in the complaints, in violation of Section 8(a)(1) of the Act. The complaints also alleged that the Company engaged in unlawful surveillance when "Warehouse Supervisor" Carlos Alfonsin (husband of Lillie Centeno) drove by a lakeside meeting of the Union and observed the employees present. However, the General Counsel failed to prove that receiving clerk Alfonsin was a supervisor or agent of the Company, and I therefore dismiss this allegation in the complaints.

In view of the foregoing findings of illegal interference and coercion, I find it unnecessary to rule on other similar allegations.

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Conclusions of Law

1. By discharging Dolores Mireles on July 24, Enrique Escamilla on July 25, Dean Diaz and Anita Gonzalez on July 26, and Segundo Arguello, Jesse Flores, Raul Herrera, Joe Lopez, Mark Martinez, and Johnny Ramos on August 17 because of their support of the Union, the Company engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

2. By granting wage increases and other benefits to thwart the employees' organizational effort, by engaging in coercive interrogation and surveillance, by threatening to employ fewer employees and to reduce working hours if the employees selected a union, and by stating a policy against rehiring employees for 6 months as a pretext for denying reemployment to discriminatorily discharged employees, the Company violated Section 8(a)(1) of the Act.

3. The General Counsel has failed to prove by a preponderance of the evidence that the Company unlawfully instituted and enforced a no-solicitation policy for nonemployees and created the impression of unlawful surveillance.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order the Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged 10 employees, and having failed thereafter to reinstate them to

[27] [28]

their former jobs (at their previous places of employment, with the same duties, hours, and conditions of employment), I find it necessary to order the Respondent to offer them full reinstatement, with backpay computed on a quarterly basis plus interest at 6 percent per annum as prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), from date of discharge to date of proper offer of reinstatement.

Upon the foregoing findings of fact and conclusions of law, upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended: 3/

ORDER

Respondent, Centeno Super Markets, Inc., San Antonio, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any employee for supporting Retail Clerks Union, Local No. 455, or any other union.

(b) Granting wage increases or other benefits in the future to thwart its employees' union organizational efforts.

3/ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

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(c) Coercively interrogating any employee about union support or union activities.

(d) Coercively engaging in surveillance of its employees' union activities.

(e) Threatening to employ fewer employees or reduce hours of work if the employees select a union.

(f) Informing any employee that employees may not be rehired for 6 months as a pretext for discriminatorily refusing any employee reinstatement.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Segundo Arguello, Dean Diaz, Enrique Escamilla, Jesse Flores, Anita Gonzalez, Raul Herrera, Joe Lopez, Mark Martinez, Dolores Mireles, and Johnny Ramos immediate and full reinstatement to their former jobs or, if their jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for their lost earnings in the manner set forth in the Remedy.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all records necessary to analyze the amount of backpay due under the terms of this Order.

[28] [29]

(c) Post at its stores in San Antonio, Texas, copies of the attached notice marked "Appendix." 4/ Copies of the notice, on forms [29] provided by the Regional Director for Region 23, after being duly signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS ALSO ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C.

/s/ Marion C. Ladwig
Marion C. Ladwig
Administrative Law Judge

4/ In the event the Board's Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX JD-374-75

FORM NLRB-4727
(9-69)

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board having found, after trial, that we violated Federal Law by discharging 10 employees at our three stores for supporting a union and by otherwise interfering with our employees' right to join and support a union:

WE WILL OFFER full reinstatement, with backpay plus 6 percent interest, to all these employees:

Segundo Arguello	Raul Herrera
Dean Diaz	Joe Lopez
Enrique Escamilla	Mark Martinez
Jesse Flores	Dolores Mireles
Anita Gonzalez	Johnny Ramos

WE WILL NOT discharge any of you for supporting RETAIL CLERKS UNION, LOCAL NO. 455, or any other union.

WE WILL NOT grant any wage increases or other benefits in the future to turn you against a union.

WE WILL NOT coercively question you about union support or union activities.

WE WILL NOT coercively spy on your union activities.

WE WILL NOT threaten to employ fewer employees or reduce hours of work if you select a union.

WE WILL NOT tell any of you that we will not rehire any employee for 6 months as an excuse for not rehiring an employee.

WE WILL NOT unlawfully interfere with your union activities.

CENTENO SUPER MARKETS, INC.

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, One Allen Center, 500 Dallas Avenue, Suite 920, Houston, Texas 77002 Telephone (713) 226-4296.

APPENDIX "F"

29 U.S.C. §§ 158(a)(1) & (3) (1970), *as amended* (49 Stat. 449 (1935), *as amended*, 65 Stat. 501 (1951), *as amended*, 73 Stat. 519 (1959)):

(a) It shall be an unfair labor practice for an employer -

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an alection held as provided in section 159(e) of this title within one year preceding the

effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

29 U.S.C. § 160(e) (1970), *as amended* (49 Stat. 453 (1935), *as amended*, 61 Stat. 136 (1947) *as amended*, 72 Stat. 941 (1958)):

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order

such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

APPENDIX "G"

Excerpt from HR Rep. No. 245, 80th Cong. 1st Sess. 41-42 (1947), reprinted in Legislative History of the Labor Management Relations Act 1947 at pp. 332-33 (1974):

> The Supreme Court has insisted that the circuit courts of appeals, in reviewing decisions of the Board, adhere strictly to those terms of the act that deal with the Board's findings and with the kind of evidence upon which the Board can rest them (*Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197 (1938); *National Labor Relations Board v. Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939); *International Association of Machinists v. National Labor Relations Board*, 311 U.S. 72, 79 (1940); *National Labor Relations Board v. Automotive Maintenance Mach. Co.*, 315 U.S. 282 (1942); *Foote Bros. Gear & Machine Corp. v. National Labor Relations Board*, 311 U.S. 620 (1940); *Link-Belt Co. v. National Labor Relations Board*, 311 U.S. 584 (1941)). Anything more than a "modicum," a "scintilla" of evidence is enough, or the Board may rely upon "inferences," "imponderables," "background material," or "the whole congeries of facts."
>
> These clauses of the act have resulted in what the courts have described as "shocking injustices" in the Board's rulings, "assinine reasoning" by the Board, findings "overwhelmingly opposed by the evidence," findings that "strain our credulity," and "remarkable discrimination" on the part of the Board in believing its own witnesses and in disbelieving others. (See, for example, *Wilson & Co. v. N.L.R.B.*, 126 Fed. 114, 117 (C.C.A. 7, 1942); *Wyman-Gordon Co. v. N.L.R.B.*, 17 L.L.R. 823 (C.C.A. 7, 1946); *N.L.R.B. v. Columbia Products Corp.*, 141 Fed. (2d) 687

> (C.C.A. 2, 1944); *N.L.R.B. v. Union Pacific Stages, Inc.*, 99 Fed. (2d) 153 (C.C.A. 9, 1938), and cases cited therein.)
>
> However repugnant to the courts the Board's decisions may seem, the act, by making the Board in effect its own Supreme Court so far as its findings of fact are concerned, renders the courts all but powerless to correct the Board's abuses.
>
> Courts often have deferred to the assumed expertness of the Board when their own judgment would lead them to disagree. The Board's expertness is largely theoretic. See: T. R. Iserman, *op. cit.*, pp. 60-62.
>
> Requiring the Board to rest its ruling upon facts, not interferences, conjectures, background, imponderables, and presumed expertness will correct abuses under the act.
>
> The bill does this, by providing in section 10(b) of the amended Labor Act that "so far as practicable," the new Board's proceedings shall be conducted "in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure." There is no such diversity in the rules of evidence among the several States as to make this clause unduly burdensome to the Board or to its trial examiners. Local lawyers and the Administrator's regional attorneys appearing before the trial examiners can always advise them of oddities in local laws. And, in any event, an error in admitting or excluding evidence can be grounds for reversal only if it is substantial.
>
> To enable the courts to correct glaring errors in the Board's findings, sections 10(e) and 10(f) of the amended act, instead of making the Board's findings of fact "conclusive," provides that they shall have this quality only if they are not against the "manifest weight of the evidence" and are supported by substantial evidence. Although many have urged that the courts be authorized to modify and set

aside findings of the Board when they were against the simple weight of the evidence, the committee believes that with a new and *impartial* Board, trials *de novo* in the courts will not be required.